87-1989

No. ____

FILED
JUN 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE THEODORE B. GOULD, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and MIAMI CENTER CORPORATION,
Petitioners

APPENDIX TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CHIEF BANKRUPTCY JUDGE THOMAS C. BRITTON, AND SENIOR BANKRUPTCY JUDGE SIDNEY M. WEAVER

ROBERT M. MUSSELMAN *
413 7th Street, NE
Charlottesville, Virginia 22901
Telephone (804) 977-4500
Attorney for Petitioners Holywell Corporation, Miami Center Limited Partnership, Chopin Associates and Miami Center Corporation

THEODORE B. GOULD, *pro se*
Echo Hill Farm
Garth Road
Charlottesville, Virginia 22901
Telephone: (804) 295-7125

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

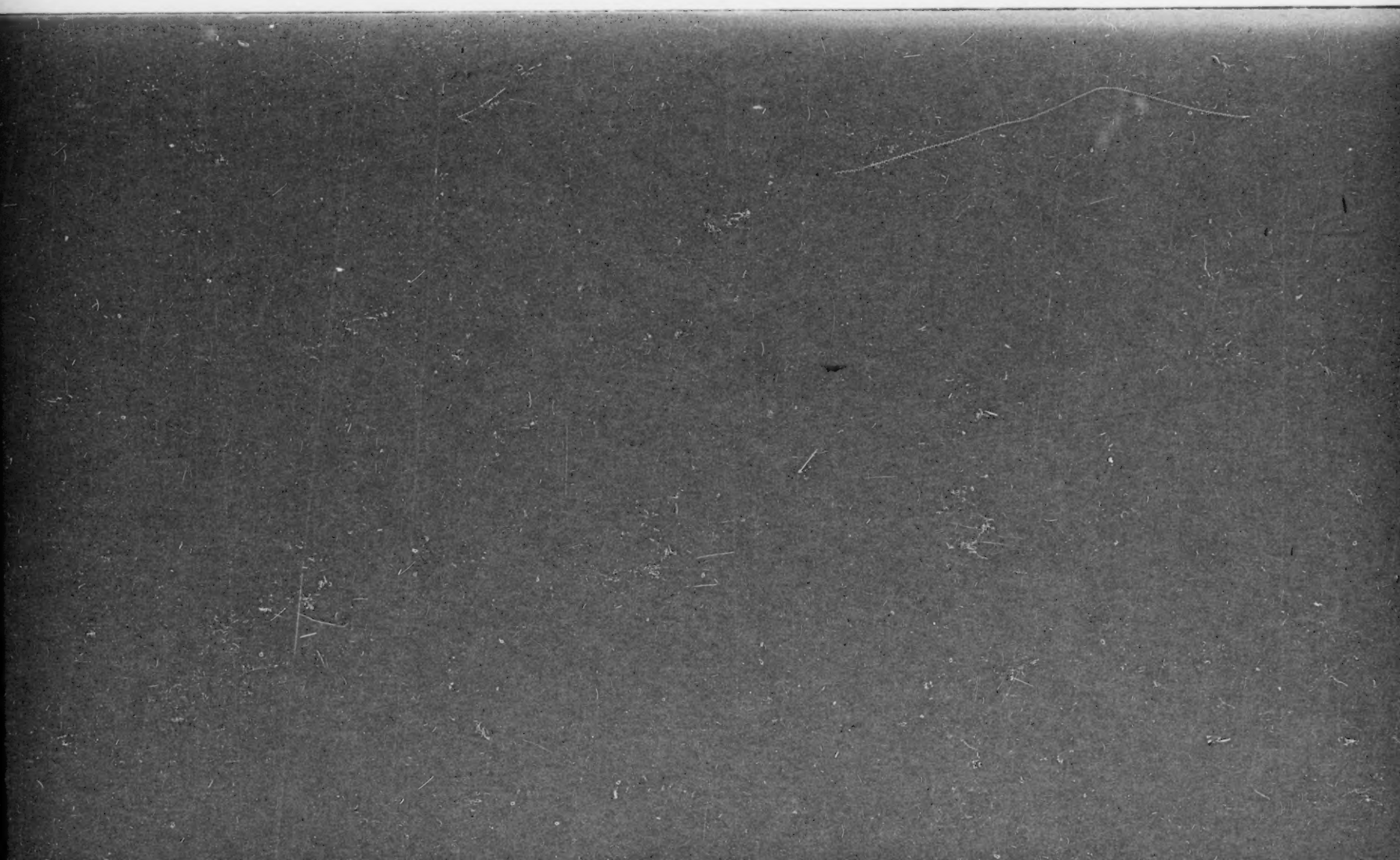

TABLE OF CONTENTS

APPENDICES

		Page
1.	Order of Eleventh Circuit Court of Appeals Entered January 22, 1988 (Denial of Petition for Writs of Prohibition and Mandamus)	1a
2.	Opinion of Eleventh Circuit Court of Appeals entered June 29, 1987 (Reported at 820 F2d 376)	2a
3.	"Order Affirming Confirmation Order and Plan," Entered March 20, 1986 (Reported at 59 B.R. 340)	11a
4.	Final Order of Dismissal With Prejudice, U.S. District Court (S.D. Fla.), filed April 30, 1986	37a
5.	Order of Eleventh Circuit Court of Appeals (On Petition for Rehearing), entered September 8, 1987 (Reported at 826 F2d 1010)	40a
6.	Order of Eleventh Circuit Court of Appeals (On Petitions for Rehearing and Petition for Rehearing En Banc), entered on March 10, 1988 (Reported at 838 F2d 1547)	42a
7.	"Order of Remand and Denial of Motion to Dismiss," U.S. District Court (S.D. Fla.), entered on December 30, 1985	65a
8.	Memorandum Opinion of U.S. District Court (S.D. Fla.), entered June 30, 1986	83a
9.	"Order Directing Closing of Chapter 11 Case," U.S. Bankruptcy Court (S.D. Fla.), entered April 28, 1986	92a
10.	Order of U.S. Bankruptcy Court, entered on March 20, 1987	94a
11.	Order on Remand, U.S. Bankruptcy Court (S.D. (Fla.), entered on January 29, 1986	96a
12.	Memorandum Decision of the U.S. Bankruptcy Court (S.D. Fla.), entered on June 24, 1985 (Reported at 51 B.R. 56)	137a
13.	Memorandum Opinion of the U.S. District Court (S.D. Fla.), entered on March 24, 1987	144a

TABLE OF CONTENTS—Continued

APPENDICES Page

14. "Order Affirming Bankruptcy Court's Order on Claim 502," U.S. District Court (S.D. Fla.), entered on April 4, 1988 ..... 161a
15. Memorandum Decision of the U.S. Bankruptcy Court (S.D. Fla.), entered on September 27, 1985 ..... 167a
16. Memorandum Opinion and Order of Remand, U.S. District Court (S.D. Fla.), Entered on April 27, 1987 ..... 170a
17. "Judgment Determining Amount, Validity and Extent of Liens of The Bank of New York," U.S. Bankruptcy Court (S.D. Fla.), entered on March 20, 1985 ..... 186a
18. "Order Affirming Decision of the Bankruptcy Court," U.S. District Court (S.D. Fla.), entered on February 20, 1987 ..... 190a
19. Opinion of the Eleventh Circuit Court of Appeals (Per Curiam), entered March 18, 1988.... 201a
20. "Order on Debtors' 'Undersecurity' Claim," U.S. Bankruptcy Court (S.D. Fla.), entered on December 18, 1987 ..... 202a
21. "Final Judgment" (With "Findings of Fact and Conclusions of Law"), U.S. Bankruptcy Court (S.D. Fla.), entered on April 28, 1988 ..... 204a
22. "Order of Certification of Contempt," U.S. Bankruptcy Court (S.D. Fla.), entered on April 7, 1988 ..... 218a
23. Order of the U.S. Bankruptcy Court (S.D. Fla.), entered on December 31, 1984 ..... 223a
24. "Order on Appellants' Emergency Motion For Stay Pending Appeal," U.S. District Court (S.D. Fla.), entered on October 4, 1985 ..... 227a
25. Excerpts from Transcript of July 18, 1985 (Hearing on Substantive Consolidation), U.S. Bankruptcy Court (S.D. Fla.) 230a

TABLE OF CONTENTS—Continued

APPENDICES Page

26. "Confirmation Order," U.S. Bankruptcy Court (S.D. Fla.), entered on August 8, 1985 (Reported at 54 B.R. 41) 246a

27. "Order Appointing Trustee," U.S. Bankruptcy Court (S.D. Fla.), entered on August 12, 1985.. 251a

28. Excerpts from Transcript of January 18, 1986 (Hearing on Remand from Judge Aronovitz), U.S. Bankruptcy Court (S.D. Fla.) 258a

29. Order on Remand, U.S. Bankruptcy Court (S.D. Fla.), entered on November 10, 1986 ..... 264a

30. Excerpts from Transcript of June 15, 1987 (Hearing on Remand from Judge Kehoe), U.S. Bankruptcy Court (S.D. Fla.) 300a

31. Excerpts from Transcript of May 15, 1987 "Conference (In Chambers)," U.S. Bankruptcy Court (S.D. Fla.) 336a

32. Errors of Fact and Law (as contained in March 10, 1988 Order of Eleventh Circuit Court of Appeals, 838 F2d 1547) 341a

33. Relevant Constitutional and Statutory Provisions 408a

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-6105

IN RE: THEODORE B. GOULD,
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES and
MIAMI CENTER CORPORATION,
Petitioners.

ON PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

[Filed Jan. 22, 1988]

Before TJOFLAT, HATCHETT and ANDERSON, Circuit Judges.

BY THE COURT:

The Petition for Writ of Prohibition and Writ of Mandamus is DENIED.

APPENDIX 2

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, and HOLYWELL CORPORATION,
Plaintiffs-Appellants,
v.

BANK OF NEW YORK,
Defendant-Appellee.

MIAMI CENTER CORPORATION and
CHOPIN ASSOCIATES,
Plaintiffs-Appellants,
v.

THE BANK OF NEW YORK, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

June 29, 1987

OPINION OF THE COURT

Before GODBOLD and ANDERSON, Circuit Judges, and SWYGERT*, Senior Circuit Judge.

GODBOLD, Circuit Judge:

These consolidated appeals are before us on two separate but related district court decisions: (1) affirmance of the bankruptcy court's confirmation of a proposed reorganization plan (No. 86-5286); and (2) dismissal of a separate action against the Bank of New York (No. 86-5386). We dismiss these appeals as moot.

BACKGROUND

Appellants are the five debtors in the underlying Chapter 11 proceeding: Theodore Gould; Holywell Corporation (Gould is sole stockholder and president); Miami Center Corporation (wholly-owned subsidiary of Holywell with Gould as president); Chopin Associates (general partnership between Gould and Miami Center Corporation); and Miami Center Limited Partnership (Gould and Miami Center Corporation are general partners and owners of some limited partnership shares). These debtors developed the Miami Center Project, which consisted of an office building, a hotel, retail space and a garage in downtown Miami. The Bank of New York financed the construction of the Project.

Debtors filed voluntary petitions for bankruptcy when the Bank instituted foreclosure proceedings against the Project. The filing of the petitions automatically stayed all actions against debtors, including the Bank's foreclosure action. Over 400 creditors have or had an interest in the bankruptcy proceeding.

---

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Both debtors and the Bank filed competing reorganization plans in the bankruptcy proceeding.[1] The creditor committees and individual creditors overwhelmingly approved the Bank's plan and rejected debtors' plan. The bankruptcy court subsequently confirmed the Bank's plan, over debtors' and debtor-affiliated entities' objections.[2]

Debtors sought to stay the implementation of the reorganization plan pending an appeal to the district court. The bankruptcy court conditioned such a stay on the posting of a $140 million bond, later reduced by the dis-

---

[1] Although the five debtors submitted individual plans, the plans were virtually identical.

[2] The central features of the reorganization plan were:

(1) substantive consolidation of the estates of the five debtors;

(2) creation of the Miami Center Liquidating Trust, consisting of all assets of debtors, for the payment of creditor claims by a court-appointed liquidating trustee;

(3) purchase by the Bank or its designee of the project (including furniture, fixtures and equipment) for the appraised value of $255.6 million, which was to be funded by net amount owed to the Bank by debtors (approximately $240 million) plus new cash by the purchaser;

(4) release by the Bank of its cash collateral (approximately $30 million), which would be added to the new trust;

(5) further financing commitment of approximately $15 million by the Bank for payment of the claim of Miami Center Joint Venture (which is a general partnership between Gould and Olympia & York Corporation) for the furniture, fixture and equipment leased by the joint venture to the project (a) if and when such claim is allowed over the Bank's pending objections now on appeal in a separate action; (b) to the extent that other assets of the trust prove insufficient to pay the claim; and (c) only if it is ultimately determined that the joint venture has been damaged by its allegedly improper classification under the reorganization plan;

(6) classification of the claimants so that unaffiliated creditors of Holywell are paid first, unaffiliated creditors of other debtors paid next, and inter-debtor and related party claims paid last; and

(7) dismissal by the trustee of the pending related lawsuit by debtors against the Bank.

trict court to $50 million. We dismissed an interlocutory appeal of this bond requirement for lack of jurisdiction. Debtors failed to post the bond within the required time limit, and the trustee began implementing the reorganization plan, including the sale of the Miami Center Project to the Bank's designee for $255.6 million.

Debtors appealed the bankruptcy court's confirmation of the reorganization plan. District Judge Aronovitz of S.D. Florida denied the Bank's motion to dismiss the appeal and remanded the case to the bankruptcy court for entry of explicit findings of fact and conclusions of law upon which the district court could properly base its appellate review. On remand the bankruptcy court held an evidentiary hearing and solicited proposed findings of fact and conclusions of law from each party. The bankruptcy court adopted the Bank's proposed findings and again confirmed the Bank's proposed reorganization plan. On appeal Judge Aronovitz affirmed the bankruptcy court's confirmation order. 59 B.R. 340.

Debtors also filed a separate action in district court against the Bank, alleging fraud, RICO violations, and other claims in connection with construction loans made by the Bank for the Miami Center Project. District Judge Hoeveler of S.D. Florida dismissed this related action primarily because the reorganization plan, which was confirmed by Judge Aronovitz, instructed the trustees to dismiss the action. Debtors now appeal both Judge Aronovitz's confirmation of the reorganization plan (No. 86-5286) and Judge Hoeveler's dismissal of debtors' related action against the Bank (No. 86-5386).[3]

---

[3] Debtors object to the reorganization plan on several grounds: substantive consolidation of the debtors' estates was clearly erroneous; subordination of the claims of debtor-affiliated entities was clearly erroneous; and modification and amendment of the reorganization plan was improper where the Bank failed to issue a disclosure statement regarding the proposed changes and the bank-

DISCUSSION

The Bank's motion to dismiss these appeals was carried with the case. The Bank contends that the appeals are moot because the reorganization plan has been substantially consummated. It relies primarily on our decisions in *In re Matos*, 790 F.2d 864 (11th Cir.1986) and *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). We explained in *In re Matos* that "when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal." 790 F.2d at 865; *see also In re Sewanee Land*, 735 F.2d at 1295-96.

The rationale in these cases for dismissing an appeal as moot for failure to obtain a stay pending appeal is that a court cannot order relief without compromising the integrity of the sale of the property to a good faith purchaser. *In re Matos*, 790 F.2d at 866; *Markstein v. Massey Assocs.*, 763 F.2d 1325, 1327 (11th Cir.1985). In this case debtors did not post the bond for the stay, and the project has since been sold to a good faith purchaser. This does not conclude our inquiry, however, because the reorganization plan governed more than just the sale of the project, and an appeal is not moot if the court can still order some effective relief. *See In re Matos*, 790 F.2d at 865 n. 3 (although court could not reverse title if the debtor failed to obtain a stay pending appeal, the appeal was not moot where the debtor could obtain an award of damages from the trustee); *see also In re AOV Indus.*, 792 F.2d 1140, 1146 (D.C.Cir.1986)

---

ruptcy court failed to require a hearing on the proposed changes. Debtors also contend that the district court erred in dismissing their related action against the Bank. The Bank makes two motions, which were carried with the case; a motion to dismiss the appeals as moot and a motion to strike debtors' reply brief.

("[F]ailure to obtain a stay is not *per se* dispositive of *all* the issues before [the appellate court].").

The proper standard to apply in this case is whether the reorganization plan has been so substantially consummated that effective relief is no longer available *See In re AOV Indus.*, 792 F.2d at 1147-48 ("Determinations of mootness . . . require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail."); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 407 n. 1 (5th Cir.1985) ("To dismiss [an] appeal on the basis of mootness, we must find that the plan has been so substantially consummated that effective judicial relief is no longer available to [the complaining party].") *In re Information Dialogues, Inc.*, 662 F.2d 475, 476 (8th Cir.1981) (per curiam) (appeal moot when it is "impossible for a court to grant effective relief"); *In re Roberts Farms*, 652 F.2d 793, 797 (9th Cir.1981) (appeal moot when reorganization plan "has been so far implemented that it is impossible to fashion effective relief for all concerned").

Debtors asked Judge Aronovitz to reverse both the bankruptcy court's substantive consolidation of their estates and the court's confirmation of the proposed reorganization plan. They concede on appeal that circumstances have changed since the confirmation order was entered and that complete reversal of the bankruptcy court's orders may no longer be possible. They instead ask for partial reversal and more limited relief. First, they ask us to reverse the bankruptcy court and essentially restructure the reorganization plan so that debtor-affiliated creditors have priority to all remaining funds in the estate. Second, they ask us to reinstate their related lawsuit against the Bank.[4]

---

[4] Debtors request the following specific relief:

(1) reverse in part the substantive consolidation order and unconsolidate the estates that are solvent (Holywell and Gould),

The reorganization plan has been substantially consummated.[5] The trustee has conveyed the project, worth over $250 million, to a good faith purchaser pursuant to the reorganization plan. With the exception of debtor-affiliated creditors, the trustee has paid the undisputed claims of all creditors and reserved funds to pay the disputed claims of the remaining creditors. Effective relief is therefore impossible. *See In re Information Dialogues, Inc.*, 662 F.2d at 476 (effective relief impossible

---

close their cases, and let them emerge from bankruptcy with their remaining assets;

(2) reverse in part the confirmation order and restore to their proper status "super priority" loans made by Gould and Holywell to the Miami Center Project so that they have priority over all other creditor claims;

(3) reverse in part the confirmation order and modify the reorganization plan so that leasing claims by debtor-affiliated creditors are restored to the priorities to which they are entitled under the Bankruptcy Code;

(4) reverse in part the confirmation order and vacate the trustee's certificate that entitles the Bank to recover any funds it advances to the joint venture for furniture, fixtures and equipment or modify the reorganization plan so that the Bank's claim for reimbursement is junior to debtor-affiliated claims;

(5) distribute the remaining funds in accordance with the revised classification of the remaining creditor claims; and

(6) reverse Judge Hoeveler's dismissal of debtors' related action against the Bank and reverse in part the confirmation order, thus requiring the trustee to pursue debtors' related action or permitting debtors to pursue the action on their own.

[5] 11 U.S.C. § 1101(2) defines "substantial consummation" for purposes of bankruptcy as follows:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

where all undisputed creditor claims have been paid and funds reserved for all disputed creditor claims).

Debtors' reliance on *In re AOV Indus.*, 792 F.2d 1140 (D.C.Cir.1986) is misplaced. In that case substantial funds remained available to compensate the remaining creditors. At the time of the hearing, "only $643,000 of the $3 million made available by the [purchaser's] letter of credit had been drawn down, and none of [the debtor's] $800,000 contribution had been distributed." *Id.* at 1149. Moreover, the court explained that on a motion to dismiss an appeal as moot, a court must consider the proposed relief's "potential impact on the reorganization scheme as a whole," including whether the relief will "implicate or have an adverse effect on the interests of other, non-party creditors." *Id.* at 1148-49.

Unlike the situation in *In re AOV Indus.*, the impact of the proposed relief on the reorganization plan and innocent creditors would be significant. Debtors can obtain their requested monetary relief only at the expense of the few remaining unaffiliated creditors whose claims are still in dispute and of the Bank, which has complied with all of its obligations under the reorganization plan. This relief therefore would not be effective judicial relief.

Reinstating the related lawsuit against the Bank and permitting the trustee or debtors to pursue the action would be similarly ineffective relief. Dismissal of the suit against the Bank was an integral part of the reorganization plan, pursuant to which the Bank released $30 million of its cash collateral and extended a further financing commitment of $15 million. Because the Bank has complied with its obligations under the reorganization plan, and because the trustee has paid or reserved funds to pay all creditors other than debtor-affiliated creditors, this court cannot provide effective relief.

Following the submission of these appeals for decision the appellants have moved to supplement the record by

filing orders and opinions entered by the Southern District of Florida and the bankruptcy court of the Southern District of Florida, allegedly concerning the matters submitted to this court for decision. The motion is DENIED. This court has, however, treated the motion as though it had been filed under FRAP Rule 28(j) and has considered the opinions and orders attached to the motion as supplemental citations. Having considered these supplemental citations, the court remains of the view that these appeals must be and are DISMISSED.

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No.: 85-3225-Civ-Aronovitz (Appeal)

Bk. Nos.: 84-01590-BKC-TCD
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,
Appellants,

v.

THE BANK OF NEW YORK,
Appellee.

ORDER AFFIRMING CONFIRMATION ORDER AND PLAN

I. THE NATURE OF THE APPEAL

THIS APPEAL involves, as appellants, five (5) related debtors who simultaneously filed Chapter 11 proceedings in the United States Bankruptcy Court, submitting almost identical Plans for Reorganization; and as appellee, the principal creditor, the Bank of New York, a mortgage lien-holder for the subject real property development.

Appellants appeal from two (2) Orders of the Bankruptcy Judge, intertwined and interdependent:

A. An Order approving the substantive consolidation of the debtors' estates (Court Paper ["CP"] 840); and,

B. The trial court's Order confirming the Plan of Reorganization proposed by the appellee here, the Bank of New York, the major creditor of the debtors' estates (CP 906).

These appeals are taken from the Order approving Substantive Consolidation of the debtors' estates and the Order Confirming the appellee's Plan of Reorganization.

II. THE PARTIES AND THEIR RESPECTIVE INTERESTS

The debtors are as follows:

1. Holywell Corporation ("Holywell") is a Delaware corporation, incorporated in 1976, which, together with its subsidiaries, owns, operates, and provides a full range of services for commercial real estate. Theodore B. Gould is the sole stockholder of Holywell.

2. Miami Center Limited Partnership ("MCLP") is a Florida limited partnership which was formed in 1979. The general partners are Theodore B. Gould and Miami Center Corporation. There are numerous limited partners, which include Theodore B. Gould and Holywell. MCLP leased the land from Chopin Associates and then constructed the Miami Center Project on that land.

3. Miami Center Corporation ("MCC"), a Florida corporation, was incorporated in 1979. MCC is a subsidiary of Holywell. Holywell, in turn, is the principal stockholder of MCC.

4. Chopin Associates ("Chopin"), a Florida partnership composed of Theodore B. Gould and MCC, was

formed in 1979 and is the owner of the land underlying the Miami Center.

5. Theodore B. Gould ("Gould") is the sole stockholder, a director and president of Holywell, the president and a director of MCC, a general partner of MCLP, and a partner of Chopin Associates.

The Bank of New York (the "Bank") was the construction lender for the Miami Center Project.

Construction of the Miami Center Project commenced in 1980. Chopin purchased the land and, together with MCLP, obtained a construction loan from the Bank of New York on March 23, 1980 in the initial amount of $112,500,000. Chopin's mortgage was $23,000,000.

Gould, in addition to his interest in the Miami Center Project, also acquired four blocks of land, still vacant, adjacent to the Miami Center Project. That vacant land is not involved in these bankruptcy proceedings. Gould then entered into a joint venture in May 1981 with Olympia and York Florida Equity Corporation ("O&Y"), called the Miami Center Joint Venture ("MCJV"), which provided for the development of those blocks and further provided that O&Y would loan to MCJV $7,775,000. These funds were used by MCJV to acquire furniture, fixtures, and equipment ("FF&E") which were leased to MCLP for use in the Pavillon Hotel and Podium, which are part of the bankruptcy estate. The MCJV-MCLP leases of FF&E were referred to by the parties and the Bank and in the proceedings below as Lease "A" and Lease "B". MCJV is solvent and has not filed under the Bankruptcy Code.

MCLP also leased additional FF&E, including electronic and telephone equipment, from two subsidiaries of Holywell, Holywell Telecommunications Company ("Holywell Telecommunications") and Holywell Leasing Company ("Holywell Leasing") (the "C" and "D" Leases,

respectively) on February 1, 1983. Holywell and Gould supplied capital to Holywell Leasing and Holywell Telecommunications in the amount of $7,718,466 to purchase the FF&E which was leased by Holywell Telecommunications and Holywell Leasing to MCLP. Like MCJV, Holywell Telecommunications and Holywell Leasing are solvent companies and have not filed under the Bankruptcy Code.

The appellants are five (5) related or affiliated debtors which voluntarily sought reorganization under the Bankruptcy Code. The debtors developed the Miami Center Project in downtown Miami. Only Phase I of that project was built. Phase I consists of an office building, a hotel, retail space connecting them, and a parking garage. The project failed financially, and several hundred creditors are still owed money by the debtors for goods and services. The appellee Bank was the construction lender for the project, and was owed more than $240,000,000. Total claims against the debtors exceed $350,000,000.

Over 400 creditors have or had an interest in these proceedings, of which at least 200 represent wage-earner claims. Since the confirmation of the appellee's proposed plan of reorganization by the Bankruptcy Court's Confirmation Order (which Order is the subject of this appeal), the Liquidating Trustee has paid, or has reserved funds to pay, all creditors in Classes 1 through 6, as those classifications were drawn under the Plan.[1] The amount paid out to claimants or "reserved" for payment by the Liquidating Trustee thus far is approximately $14 million, leaving approximately $8.9 million dollars remaining in the consolidated debtors' estates to pay the remaining creditors' claims.

---

[1] *See* Part IV., *supra.*

III. PROCEDURAL HISTORY

The Chapter 11 proceedings, which culminated in the Order of Confirmation from which this appeal is taken, were initiated through the filing of voluntary petitions under Chapter 11 by each of the five debtors/appellants who are parties to this appeal. The voluntary petitions for reorganization were filed by the debtors on August 22, 1984, less than a month after the appellee had initiated foreclosure proceedings in state court upon declaring the debtors' mortage loans on the Miami Center to be in default.

In the course of Chapter 11 reorganization proceedings, both the debtors and the Bank of New York filed competing reorganization plans. The five debtors each submitted a separately filed plan, but the content of the five debtors' plans was virtually identical. (The details of the competing plans are discussed in Part IV of this opinion, *infra.*) The various creditors' committees and individual creditors, upon consideration of the competing plans, overwhelmingly approved the Plan of the appellee, the Bank of New York, and rejected the debtors' Plans. The Bank's Plan was subsequently confirmed by the Bankruptcy Court (CP 906).

The debtors then sought, unsuccessfully, to stay the implementation of the confirmed Plan, pending appeal to the United States District Court. When the Bankruptcy Court conditioned the issuance of such a stay upon the posting of a supersedeas bond in the amount of $140 million dollars (CP 1013), the debtors filed an emergency motion in the United States District Court seeking relief from the bond requirement. That Court, by the Order of Chief Judge James Lawrence King, reduced the amount required to obtain a stay of the Bankruptcy Court's order to $50 million dollars (Docket Number ["DN"] 4). Unable to post this reduced bond, the debtors finally sought relief from Judge King's order by

filing an appeal in the Eleventh Circuit Court of Appeals. The appeals court dismissed the debtors' appeal on the basis of lack of jurisdiction on October 9, 1985. On October 10, 1985, pursuant to the confirmed Plan of Reorganization, the Miami Center property was sold to the appellee's designee for $255.6 million dollars.[2]

Prior to the sale of the Miami Center Project, on October 1, 1985, the debtors initiated the instant appeal to this Court from the Confirmation Order entered below. This Court received extensive briefs as well as the parties' designated record on appeal, and heard oral argument by counsel for the debtors and for the Bank on December 5, 1985. During the course of this appeal, and prior to the hearing noted above, the appellee filed a motion to dismiss this appeal on the ground of mootness. Having considered the issues presented by the appeal, the record before it, and the appellee's motion to dismiss, this Court entered its Order of Remand and Denial of Motion to Dismiss (DN 35) on December 30, 1985. In that Order, this Court denied the appellee's motion to dismiss on the ground that the Court retained the capacity to grant effective relief to the appellants herein in the event that they should prevail on the merits in this appeal. Upon the subsequent motion of the appellee, the Court certified the question of mootness and the propriety of its Order denying the motion to dismiss pursuant to Title 28 U.S.C. § 1292 (DN 44), and the appellee filed its interlocutory appeal in the Eleventh Circuit Court of Appeals. Under date of March 17, 1986, the Eleventh Circuit DENIED permission to appeal pursuant to 28 U.S.C. § 1292(b).

---

[2] The purchase price of $255,600,000 was funded by the Bank through elimination of its mortgage liens, the waiver of interest owed by the debtors thereon, and the application of certain cash collateral (approximately $30,000,000) derived from the sale by the debtors of certain real estate holdings near Washington, D.C. The closing also resulted in the Bank paying over to the Trustee approximately $11.4 million dollars cash at closing.

By the same Order of Remand and Denial of Motion to Dismiss, this Court remanded the substantive appeal to the Bankruptcy Court for the entry, by that court, of explicit findings of fact and conclusions of law upon which this Court could properly base its appellate review. This remand was necessitated by the determination that the Confirmation Order entered by the Bankruptcy Court was not sufficiently supported by such findings and conclusions.

On remand, the Bankruptcy Court held an evidentiary hearing on all matters requested by the parties. Additional evidence was adduced on the following requested matters, to-wit:

A. The Value of the Miami Center Project;

B. The Value or "Cost/Benefit" of the District Court Action; and,

C. The Calculation of the Bank's Lien.

On January 29, 1986, the Bankruptcy Court concluded its proceedings on remand, having solicited from all parties their proposed findings of fact and conclusions of law as well as the objections of each party to the submissions of opposing parties. The Bankruptcy Court thereupon entered its Order on Remand, in which it adopted *in toto* and unaltered, the proposed findings of fact and conclusions of law submitted by the appellee, the Bank of New York.[3] Thus, the initial Confirmation

---

[3] The appellants in their Brief Following Order on Remand have severely chided the Bankruptcy Judge, and the appellee, for the manner in which the findings of fact and conclusions of law were adopted in this case. Specifically, the appellants take issue with the decision by Judge Britton to adopt verbatim, without any deletion or addition, the proposed findings and conclusions submitted by the appellee while rejecting totally those proposed by appellants.

This Court is well aware of the censure which this practice often elicits, and which the Court of Appeals for this Circuit has clearly

Order, as amended by the adoption of these findings of fact and conclusions of law, constitutes the basis of the debtors' substantive appeal.

IV. THE COMPETING PLANS OF REORGANIZATION

The debtors' plans (CP 466-470) differed substantially from that submitted by the Bank of New York and later confirmed by the Bankruptcy Court. The debtors' plans would have depended for their success upon the consummation of an "option" for the sale of all property owned by the debtors as part of the Miami Center property to the Hadid Investment Group, Inc. (*See, e.g.*, the Amended Plan of Reorganization filed by the Miami Center Corporation, CP 468, Exhibit A.). The plan(s) further provided, in pertinent part, for a classification scheme by which, *inter alia*, the claims of the Bank of New York

---

expressed. *Cabriolet Porsche-Audi, Inc. v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985) (disapproving the practice of verbatim adoption of findings and conclusions prepared by one party to this litigation). This Court does not condone the practice followed by the Bankruptcy Judge in this case. It is the Court's belief that a trial judge should not accept *in toto* the findings and/or conclusions proposed by a party to litigation without an independent analysis in which the judge augments or replaces the proposed findings with his own.

Notwithstanding this admonition, the Court is also aware of the United States Supreme Court's ruling in *Anderson v. Bessemer City*, 470 U.S. ——, 105 S.Ct. 1504 (1985). There, while disapproving of the practice of adopting unchanged the proposed findings and conclusions of a party, the Court noted that such findings "nevertheless . . . are those of the Court and may be reversed only if clearly erroneous." 105 S.Ct. at 1511. Thus, whether this Court approves of the procedure followed by Judge Britton upon remand in this appeal is not determinative. In light of the ruling in *Anderson*, but with a clear appreciation of the admonition of the Eleventh Circuit in *Cabriolet Porsche-Audi*, this Court has given close scrutiny to the findings of fact adopted below, but within the scope allowed such review by the "clearly erroneous" standard of Bankruptcy Rule 8013.

under its mortgage liens would be equitably subordinated, pursuant to Title 11 U.S.C. § 510(c), to Class 5, which is subordinate to administrative claims, tax claims and mechanics liens, *inter alia*. The claims of affiliated (with the debtors) creditors would be relegated to the lowest class (Class 10), and would include claims by one debtor/appellant against another.

Lastly, the proposed plans of the debtors explicitly reserved their rights to pursue claims which were the subject of litigation in other forums. One such case is a civil action filed by the debtors against the Bank of New York (Case No. 85-0228-Civ-HOEVELER) in the United States District Court for the Southern District of Florida, which complaint alleges fraud, usury, breach of contract, and claims under the federal RICO statutes. As noted above, the plans submitted by the debtors received little support from the creditors [4], and were found by the court not to have met the standard for confirmation established by Title 11 U.S.C. § 1129.[5]

The plan submitted by the Bank of New York, adopted by the requisite number of creditors, and finally confirmed by the Bankruptcy Court, contained the following major provisions:

—The Bank would acquire the entire Miami Center Project property, including the FF&E for $255,600,000. The acquisition would be funded through

---

[4] *See* the Confirmation Order entered by Judge Britton (CP 906). At page 2 of that order, the Bankruptcy Court set out the results of the creditor voting on the respective plans:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MCC	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

[5] Confirmation Order (CP 906), at 5.

the net amount already owed to the appellee by the debtors (approximately $240,000,000) to which would be added, as cash collateral, the proceeds of the sale by the debtors of certain realty owned by them in Washington, D.C. ($32,000,000). This latter sum of $32,000,000 has been held and maintained as additional collateral by the Bank pursuant to Judge Britton's order of December 31, 1984 (Cr 303). The proceeds of closing would also produce approximately $11.4 million dollars in cash available for use under the Plan.

—A Liquidating Trustee would be appointed to oversee the operations of the Miami Center in place of the debtors in possession, and to effectuate the terms of the Plan as directed by the Bankruptcy Court. This Liquidating Trustee would be required, by the terms of the Plan, to effect the dismissal of the debtors' civil action before Judge Hoeveler, discussed previously.

—The Bank would set aside $15,000,000, backed by surety bonds, to pay the claims of two creditors which had leased FF&E to MCLP, namely, O&Y and MCJV (the partnership comprised of Olympia & York Florida Equity Corporation and debtor Theodore Gould).

—The claims of Miami Center Joint Venture, Holywell Telecommunications and Holywell Leasing, affiliated creditors who had leased the FF&E to the Miami Center owners, would be equitably subordinated to, or given a classification junior to, those of other creditors on the ground that these were "insider" claims.

—The estates of the five debtors would be combined through substantive consolidation.

The Bank's proposed plan of reorganization was confirmed on August 8, 1985 by the Bankruptcy Court's

Confirmation Order (CP 906) and was implemented upon the dismissal of the debtors' appeal by the Eleventh Circuit Court of Appeals on October 9, 1985.

V. PRESENT STATUS AS TO CONSUMMATION OF THE PLAN BY THE LIQUIDATING TRUSTEE

The United States Bankruptcy Judge noted the following in his Findings at Paragraph 57 (Page 33 of Order on Remand):

> "The Court has now also had the unusual opportunity to observe the substantial consummation of the Plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the Plan have been verified by the following, as reported by the parties and the Liquidating Trustee:
>
> (a) All Class 1 administrative claims have been paid or reserved for;
>
> (b) The Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the class 2 creditor (the Bank) and the termination of interest (accruing at over $2 million per month) and negative cash flow from operations;
>
> (c) The Class 3 creditor has been paid in full;
>
> (d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;
>
> (e) Several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and,
>
> (f) There remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact

amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. . . .".

VI. STANDARD OF REVIEW

It is settled beyond dispute that a district court, in deciding an appeal from a bankruptcy court's ruling, must accord substantial deference to the trial court's findings of fact, reversing these only when they are "clearly erroneous". *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983); *Bankruptcy Rule* 8013. Conclusions of law, however, are freely reviewable by the district court. *Matter of Multiponics*, 622 F.2d 709, 713 (5th Cir. 1980).

VII. ISSUES ON APPEAL

In their appeal from the Bankruptcy Court's Confirmation Order, the debtors/appellants raised seven distinct objections to the confirmed plan. In the course of the extensive briefing and oral argument in which counsel for the parties have participated, it has become evident to this Court, and acknowledged by counsel, that two of the issues raised in this appeal predominate:

A. The Substantive Consolidation of the Debtors' Estates; and,

B. The Equitable Subordination (or improper classification) of the claims of various creditors who were affiliated with the debtors.

A. *Substantive Consolidation*

This Court is keenly aware of the seemingly harsh results which may be produced by substantive consolidation

if the Bankruptcy Court invokes it inappropriately or contrary to law. Consequently, this phase of the appeal has been studiously examined.

The Bankruptcy Court, by its order of July 23, 1985 (CP 840) ordered the substantive consolidation of the debtors' estates. This ruling was reinforced by that court in its Confirmation Order entered August 8, 1985 (CP 906). The effect of substantive consolidation upon the debtors in this Chapter 11 proceeding is more than merely procedural; it entails the combination of the assets and liabilities of the individual debtors and the elimination of inter-debtor claims, excepting those incurred under the authorization of the Bankruptcy Court.[6] *See generally* 5 Collier on Bankruptcy, § 1106 (15th Edition). Substantive consolidation is within the power of a bankruptcy court by virtue of its general equitable power to issue those orders necessary to effectuate the provisions of the Bankruptcy Code. *In re Richton International Corp.*, 12 Bankr. Rptr. 555, 557 (S.D.N.Y. 1981), *citing Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 328 (1939).

In order to justify the imposition of substantive consolidation upon debtors in a Chapter 11 proceeding, it is incumbent upon the proponent of consolidation to show that the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition. *In re Snider Brothers*, 18 Bankr. Rptr. 230, 238 (D. Mass. 1982). As an aid to (but not as a substitute for) making this determination of the balance of equities for and against substantive consolidation, many courts employ a seven-part objective inquiry into the interrelationships

---

[6] Certain inter-debtor loans were specifically allowed by the Bankruptcy Court during the conduct of the Chapter 11 proceedings below to enable the debtors in possession to continue operation at the Miami Center. The so-called "super-priority" loans are discussed more fully at Part VII.B(3), *infra*.

of the entities to be consolidated. These seven factors (not all of which must be found to support consolidation) are:

(1) The presence or absence of consolidated financial statements;

(2) The unity of interests and ownership between various corporate entities;

(3) The existence of parent and intercorporate guarantees on loans;

(4) The degree of difficulty in segregating and ascertaining individual assets and liabilities;

(5) The existence of transfers of assets without formal observance of corporate formalities;

(6) The commingling of assets and business functions;

(7) The profitability of consolidation at a single physical location.

In Re Donut Queen, 41 Bankr. Rptr. 706, 709 (Bktcy. E.D.N.Y. 1984).

In its Order of Remand to the Bankruptcy Court, this Court instructed the court below in its findings of facts and conclusions of law to address, *inter alia*, the *Donut Queen* factors, and to enter specific findings and conclusions thereupon. Having closely reviewed the findings of fact and conclusions of law entered by the Bankruptcy Court, and having considered the briefs and oral argument of counsel for the parties, the pertinent portions of the record on appeal, and the applicable law, it is the conclusion of this Court that the order imposing substantive consolidation upon the estates of the five debtors, and that portion of the Confirmation Order which adopts this ruling, was proper and correct as a matter of law and was based on sufficient factual findings which were not, themselves, clearly erroneous.

In Paragraphs #30 to 41 of its Order on Remand, the court below entered findings of fact in support of its rulings on substantive consolidation. A review of these findings in comparison to the *Donut Queen* factors reveals that there exists in this record strong and convincing evidence to show the existence of at least five of the seven factors enumerated in that decision:

1. The presence of consolidated financial statements (inapplicable to debtors Holywell and Miami Center Corp.);
2. The unity of interests and ownership between the various corporate entities;
3. The existence of cross-claimants of guarantees on loans to other debtors;
4. . . .;
5. . . .;
6. The commingling of assets and business functions;
7. The profitability of consolidating the debtors in one location.

As to the two remaining factors (the degree of difficulty in segregating individual assets and the transfer of assets absent corporate formalities), no explicit findings of fact were entered in the court's Order on Remand.

The Bankruptcy Court's findings on five of the seven *Donut Queen* factors constitute a factual basis for its decision to order substantive consolidation in this case. This Court, however, must go further than merely evaluating the correctness of these factual findings. It must assess the propriety of imposing substantive consolidation as a matter of law. In this aspect of its review, this Court will affirm those conclusions of law entered below which correctly apply the law. Where the Bankruptcy Court has erred in its conclusions, this Court will conduct

a *de novo* review of the legal issues presented in this appeal.

Therefore, this Court rules that the Bankruptcy Court correctly determined, as a matter of law, that substantive consolidation was proper in this case. At Paragraph 67 of its Order on Remand, that court applied the standard of *In Re Snider, supra,* to the record facts in determining that greater prejudice would ensue to the proponents of substantive consolidation if that remedy were denied than would be suffered by the debtors through its imposition. Furthermore, the court's determination of the effect of the five objective factors (¶ Nos. 64 (a), (b), (f) and (g)) as proper grounds for consolidation coincides with this Court's result upon review of the record and the applicable law. For the foregoing reasons, this Court AFFIRMS that portion of the Confirmation Order (CP 906), and the separate Order on Substantive Consolidation (CP 840), approving the substantive consolidation of the estates of the five debtors/appellants which are parties to the instant appeal.

In Paragraph 66 of the Bankruptcy Judge's Order on Remand (Page 40), it is stated:

> "66. The Debtors have claimed prejudice, but have not proven it. . . . The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. . . .".

The burden of demonstrating prejudice more properly should have been placed upon the creditor/appellee. However, this Court has reexamined, in its totality, the entire record herein and by *de novo* consideration, has determined that there was ample evidence to demonstrate that, in fact, appellee had carried the burden of showing no prejudice to the appellants, notwithstanding the Bankruptcy court's findings that the debtors never demonstrated prejudice. Accordingly, the determination of the *Snider* principles have been appropriately applied and the burden is found to have been carried by appellee.

B. *Equitable Subordination/Junior Classification*

The second key element of the plan of reorganization confirmed by the Bankruptcy Court's Confirmation Order is the equitable subordination (or, as appellee chooses to characterize it, the junior classification) of certain creditor's claims, otherwise eligible for a higher priority, on the ground that they represented "insider" claims. The claims so subordinated include those of Miami Center Joint Venture and Olympia & York (Class 7) and the claims of the affiliated creditors which are the subsidiaries of debtor Holywell Corporation (Class 8). A third category of claims affected by the "equitable subordination" aspect of the confirmed reorganization plan are certain, so-called "super-priority" loans which were made by various debtors to MCLP with the express authorization of the Bankruptcy Court to supply necessary funds for the operation of the Miami Center during Bankruptcy Court proceedings, or to satisfy pressing tax obligations.

The Court has been especially sensitive to the equitable subordination aspect of this appeal and has therefore taken the utmost care in scrutinizing the record, the findings and conclusions relevant to this issue, and the treatment accorded this measure by the competing plans. After careful analysis of all the briefs and oral arguments received by the Court, it has become clear that appellants are really complaining about three sets of claims which were subjected to junior classification as a result of the Bankruptcy Court's rulings:

1.) The lease claims of Olympia & York and Miami Center Joint Venture (the "A and B leases") arising from their leases of furniture, fixtures and equipment (FF&E) to Miami Center Limited Partnership (MCLP).

2.) The lease claims of affiliated creditors Holywell Telecommunications Company and Holywell Leasing

Company (the "C and D leases") for FF&E leased to MCLP.

3.) The claims of debtors Gould and Holywell and of affiliated creditor Twin Development Corporation under their "super-priority loans" to MCLP.

Since each of these categories of subordinated claims involves a distinct group of creditors, the Court deems it appropriate to consider each in turn.[7]

(1) *The Lease Claims of Creditors—Olympia & York and Miami Center Joint Venture*

Miami Center Joint Venture and Olympia & York entered into certain lease agreements (the "A" and "B" Leases) whereby these entities leased furniture, fixtures and equipment to MCLP which were installed in the Miami Center. The validity of these leases (i.e., the fact and ruling that they are "true leases" as opposed to mere financing devices) was determined by the Bankruptcy Court in the course of an adversarial proceeding. (*See* Memorandum Decision dated June 24, 1985—CP 781.) The claims of O&Y and MCJV under these leases were explicitly subordinated to the claims of the nonaffiliated creditors (Class 6) by being placed under the confirmed plan in Class 7.

---

[7] If this aspect of the confirmed Plan (i.e., equitable subordination or classification) rested solely on a review of the subordination of claims which the appellants herein had standing to pursue, this Court would be required to analyze the findings and conclusions relevant to subordination under the standard of *Matter of Mobile Steel Co.*, 663 F.2d 692, 700 (5th Cir. 1977). Such an analysis is not required here, however. For reasons that are set more fully herein, none of these three subordinated claims are in a procedural posture such that these appellants may properly raise them in the context of the instant appeal.

From the Bankruptcy Court's orders declaring the leases as "true leases" and subordinating the creditors claims under those leases, the respective *parties in interest* have taken appeals to the District Court. These appeals, which are currently pending before the Honorable C. Clyde Atkins, Senior U.S. District Judge, are:

— *Case No. 85-3230-CIV-ATKINS*: An appeal by creditors O&Y and MCJV from the Confirmation Order of the Bankruptcy Court, specifically objecting to the subordination of their lease claims under the confirmed plan.

— *Case No. 85-3430-CIV-ATKINS*: An appeal by the Bank of New York from the Memorandum Decision of the Bankruptcy Court (CP 781) which determined the "A" and "B" leases to be "true leases".

The appellants in the instant appeal have raised the objections of *those* creditors as a method of attacking the validity of the overall reorganization plan. However, the issue of whether the claims of O&Y and MCJV have been wrongly subordinated (or classified) is one which the debtors/appellants in the instant appeal lack standing to assert because they are not parties actually injured by this classification. *R.T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983). This issue is properly presented in the appeal before Judge Atkins, brought by the parties which are directly affected by the challenged ruling, and is therefore not a proper matter for adjudication by this Court. It is possible that as a result of Judge Atkins' ruling, the classification of this claim which Judge Atkins may grant, could possibly affect the Plan overall—but this is purely a contingency which may never occur and if it did, the Bankruptcy Judge would still be vested with jurisdiction to review the matter to ascertain a change or different classification as directed by Judge Atkins. On the other hand, Judge Atkins' ruling may require no change in classification.

(2) *The Lease Claims of Affiliated Creditors—Holywell Telecommunications Company and Holywell Leasing Company*

For the same reasons discussed above with regard to the "A" and "B" Lease claims, the appeals filed by creditors Holywell Telecommunications Company (HTC) and Holywell Telecommunications Company (HLC) and assigned to the Hon. James W. Kehoe (Case No. 85-3431-CIV-KEHOE) are matters for which the appellants before this Court lack standing. One of these leases affects the telephonic equipment installed in The Project by lease arrangement, and the other affects certain electronics and telecommunications equipment, including television cable. Clearly here, and with regard to the "C" and "D" leases, these matters involve parties other than the debtors and who are truly the *parties in interest* (affiliated creditors).

It should be noted that it is not, and has never been, the purpose of this Court to interfere in any way with the matters pending before these judges. In particular, as concerns the appeals before Judge Atkins, the determination of the validity of the "A and B" leases and the proper classification of the creditors' claims thereunder are matters not properly before this Court, so the instant order shall not affect those ongoing appeals.

(3) *The So-Called "Super-priority Loans"*

A third aspect of the proceedings in the Bankruptcy Court which the appellants contend had the effect of subordinating (or eliminating) claims deserving higher priority was the apparent elimination of a "super-priority" assigned, by orders entered in the Bankruptcy Court, to loans made to Miami Center Limited Partnership with the express authorization of the Bankruptcy Court. In their briefs to this Court, appellants have identified three such loans.[8]

---

[8] The existence of the three authorized loans to Miami Center Limited Partnership from debtor Holywell Corporation, from debtor Theodore Gould, and jointly by Gould, Holywell and Twin

The confirmed Plan of Reorganization did not address the classification of these "super-priority" loans directly. It is the appellants' contention that the portion of the plan which provided for the substantive consolidation of the debtors' estates had the effect of eliminating these inter-debtor claims. The appellee counters that it is immaterial whether these claims were, in fact, subordinated (to Class 8) or retained their "superiority" status immediately junior to the Bank's mortgage lien, since any payment from one creditor to another leaves those funds in the combined pool which remains reachable by all the creditors of any debtor (likewise an effect of the substantive consolidation provision of the Confirmation Order).

The ultimate disposition of these "super-priority" liens is a pending matter yet to be decided by the Bankruptcy Court, and is therefore a matter not within the scope of the Confirmation Order which is the subject of this appeal. Because the record is silent as to how (and whether) these liens were subordinated or eliminated,

---

Development Corporation is not disputed by either party. Although larger amounts were authorized to be loaned to MCLP than were actually released from the cash collateral fund from which the loan proceeds derived, the record reflects the following actual transfers of funds:

Holywell to MCLP:	$1,419,921.99
Gould to MCLP:	$2,489,507.78
Twin Development, et al.:	$ 615,757.91
	$4,525,187.68

The "super-priority" which attached to these loans was a protection granted by the Bankruptcy Court's orders to preserve the priority (subject to the Bank's liens) of the claims of creditors of the individual debtors (i.e. Gould and Holywell). The significance of this "priority" was diminished by the substantive consolidation of the five debtors' estates, whereby creditors of Gould and/or Holywell could reach the assets of MCLP, the recipient of these loan proceeds. *See* Page 23, *infra*, with regard to further or future actions open before the United States Bankruptcy Court regarding these loans.

it is incumbent upon the Bankruptcy Court to resolve these questions after further adjudication. If the treatment accorded to these loans materially and adversely affects the rights of any *party in interest*, the terms of the Bank's Plan expressly permit any such party to assert a claim for relief from the consolidation provision [Article XIII, page 40, of the Plan; Debtors' initial appendix, page 090]. Under Article XIV(e) of the Plan [*Id.*, page 091], the Bankruptcy Court would have continuing jurisdiction to hear and determine any dispute regarding the appropriate treatment of these loan claims.

C. *Other Issues Presented on Appeal*

In addition to the two main elements of the confirmed Plan of Reorganization from which this appeal is taken, there have been raised several other aspects of the plan which, the appellants contend, warrant reversal.

(1) *The Authorization to the Liquidating Trustee to Dismiss a Pending Lawsuit Filed by the Debtors*

Since the inception of this appeal, the appellants have urged this Court to reverse the Confirmation Order on the ground that the confirmed plan called for the voluntary dismissal by the Liquidating Trustee of a civil action filed by the debtors (the District Court action, [*See* page 9-10, *supra.*)] On appeal, the debtors/appellants contend that the Bankruptcy Court was without authority to order the dismissal of that action, and that in doing so it unconstitutionally ousted the District Court from its proper jurisdiction.

In the first instance, the lawsuit was a chose in action which was part of the debtors' estate. 11 U.S.C. § 541 (a)(1). As such, it was within the power of the Bankruptcy Court to order its dismissal through the liquidating trustee. *In re Tidwell*, 19 Bankr. Rptr. 846 (E.D.

Va. 1982). Secondly, as a separate and independent ground for upholding this aspect of the plan, the Court notes that, upon the remand of this cause and upon the request of the appellants, the Bankruptcy Court performed a cost/benefit analysis of the value of this lawsuit to the debtors' estates, and concluded that its value was nil. This determination provides additional support for the inclusion in the confirmed plan of reorganization of the directive to the liquidating trustee to dismiss the District Court action.

As a furhter basis for this ruling, evidence adduced at a post-remand hearing held on January 18, 1986 showed that certain releases previously signed by the debtors effectively barred them from pursuing their civil action under principles of collateral estoppel. The Bankruptcy Court was within the scope of its authority in making this determination, as the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmations of Plans, and/or other proceedings affecting the liquidation of the assets of the estate, etc., and therefore constituted a "core proceeding". 28 U.S.C. § 157(b)(2)(A), (C), (L), and (O).

(2) *The Valuation of the Property In The Debtors' Estates*

Appellants have objected throughout this appeal to the valuation assigned by the Bankruptcy Court, through confirmation of the Bank's plan, to the realty, improvements and FF&E which constitute the Miami Center property. The appellee has contended thoughout that the valuation contained in the confirmed plan is the correct one; i.e., $255,600,000. (Order on Remand, ¶ No. 51). The value proposed by the appellants for the property is $275,000,000.

The Bankruptcy Court devoted a portion of its January 18, 1985 post-remand hearing to the issue of valuation, and heard testimony from appraisers hired by both sides who essentially defended the appraisals cited above. On the basis of such testimony, as well as the formal appraisals upon which its initial determination was made, the Bankruptcy Court confirmed the original valuation figure of $255,600,000. This Court has reviewed the record evidence and has received written as well as oral argument on this issue. In light of such review, this Court concludes that the finding of the Bankruptcy Court as to the value of the Miami Center property was not clearly erroneous, and therefore will not be disturbed as a result of this Court's action.

(3) *The Priority of Claims Based On Mechanics' Liens*

In their initial brief on appeal, the debtors/appellants challenged the classification of certain claims filed by mechanics and materialmen who had furnished the Miami Center. In addition to the fact that the appellants in the instant appeal lack standing to raise those objections, events have occurred through the implementation of the confirmed plan of reorganization which render this issue on appeal moot; i.e., that all of these Class 4 claims have been paid by the liquidating trustee.

(4) *Unfair Classification of Certain Unsecured Creditors*

This previously asserted issue of appeal suffers from the identical infirmities discussed at paragraph (3), *supra*. First, the creditors allegedly injured by this misclassification are not parties to this appeal. Second, the liquidating trustee has likewise paid out all of these Class 6 claims (or reserved the funds to do so) which were the subject of this objection to the plan.

(5) *Amendment to the Plan of Reorganization Without Issuance of Diclosure Statements or Hearing*

In the last of their original issues on appeal, the debtors objected to the fact that late modifications to the Bank's Reorganization Plan were adopted shortly before entry of the Confirmation Order. These modifications (CP 564,614,709c, and 854) consisted of stipulations and amendments to the plan as filed. The purpose of these modifications was to provide for a trustee's certificate to repay the Bank of New York for any outlay required to acquire the FF&E which was the subject of the "A" and "B" leases. The Bankruptcy Court concluded (Order on Remand, ¶ No. 81) that these modifications did not prejudice the debtors, and that since the plan had been approved by the requisite number of creditors, disclosure to those classes which had rejected the plan was not required by 11 U.S.C. § 1127.

This Court agrees with the Bankruptcy Court's conclusion that the adoption of amendments to the plan of reorganization subsequently confirmed by that court did not violate the applicable provision of the Bankruptcy Code, did not prejudice these appellants, and therefore does not constitute a basis for reversing the Confirmation Order.

VIII. CONCLUSION

Having painstakingly reviewed the record in this appeal, the voluminous briefs, appendices and other submissions of counsel for the parties, having heard extended oral argument again on the merits of the appeal on March 10, 1986, having considered the Order on Remand entered by the Bankruptcy Court, the entire record herein, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Confirmation Order entered by the Bankruptcy Court on August 8,

1985, as amended by the entry of that court's Order on Remand on January 29, 1986, is hereby AFFIRMED; and thereupon, the Order approving Substantive Consolidation is likewise AFFIRMED.

AFFIRMED

DONE AND ORDERED in Chambers at Miami, Southern District of Florida this 20 day of March, 1986.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

Copy furnished to:

Raymond W. Bergan, Esq.
Fred H. Kent, Jr., Esq.
Vance E. Salter, Esq.
S. Harvey Ziegler, Esq.
Irving M. Wolff, Esq.
Albert I. Edelman, Esq.
John W. Kozyak, Esq.
Thomas F. Noone, Esq.

APPENDIX 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-0228-Civ-Hoeveler

MIAMI CENTER LIMITED PARTNERSHIP, *et al.*,
Plaintiffs,

—vs—

THE BANK OF NEW YORK, *et al.*,
Defendants.

FINAL ORDER OF DISMISSAL WITH PREJUDICE

[Filed April 30, 1986]

THIS CAUSE having come before the Court upon the Motions to Dismiss filed by all defendants, and the Court being fully advised in the premises and having heard argument in the matter,

IT IS ORDERED AND ADJUDGED that this cause be, and the same is, hereby dismissed with prejudice.

The Court quotes from the dispositive ruling made by Judge Aronovitz in Case No. 85-3225-Civ.-Aronovitz (S.D.Fla., March 20, 1986) at 24-25:

> . . . [T]he appellants [plaintiffs in the instant cause] have urged this Court to reverse the Confirmation Order on the ground that the confirmed plan called for the voluntary dismissal by the Lquidating Trustee of a civil action filed by the debtors (the District Court action . . .). On appeal, the debtors/appellants contend that the Bankruptcy

Court was without authority to order the dismissal of that action, and that in doing so it unconstitutionally ousted the District Court from its proper jurisdiction.

In the first instance, the lawsuit was a chose in action which was part of the debtors' estate. 11 U.S.C. § 541(a)(1). As such, it was within the power of the Bankruptcy Court to order its dismissal through the liquidating trustee. *In re Tidwell*, 19 Bankr. Rptr. 846 (E.D.Va.1982). Secondly, as a separate and independent ground for upholding this aspect of the plan, the Court notes that, upon the remand of this cause and upon the request of the appellants, the Bankruptcy Court performed a cost/benefit analysis of the value of this lawsuit to the debtors' estates, and concluded that its value was nil. This determination provides additional support for the inclusion in the confirmed of reorganization of the directive to the liquidating trustee to dismiss the District Court action.

As a further basis for this ruling, evidence adduced at a post-remand hearing held on January 18, 1986 showed that certain releases previously signed by the debtors effectively barred them from pursuing their civil action under principles of collateral estoppel. The Bankruptcy Court was within the scope of its authority in making this determination, as the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmation of Plans, and/or other proceedings affecting the liquidation of the assets of the estate, etc., and therefore constituted a "core proceeding". 28 U.S.C. § 157(b)(2)(A), (C), (L), and (O).

Accordingly, this dismissal is an administrative necessity, for the actual decision has been compelled by the

decision of the Bankruptcy Court below and the affirmation of that decision by Judge Aronovitz.

DONE AND ORDERED this 30th day of April, 1986 in Chambers at Miami, Florida.

/s/ Wm. W. Hoeveler
United States District Judge

Copies furnished to counsel of record

APPENDIX 5

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
THEORDORE B. GOULD, CHOPIN ASSOCIATES, and
HOLYWELL CORPORATION,
Plaintiffs-Appellants,

v.

BANK OF NEW YORK,
Defendant-Appellee.

MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,
Plaintiffs-Appellants,

v.

THE BANK OF NEW YORK, *et al.*,
Defendants-Appellees.

Sept. 8, 1987

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD and ANDERSON, Circuit Judges, and SWYGERT,* Senior Circuit Judge.

---

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ON PETITION FOR REHEARING

(Opinion June 29, 1987, 11 Cir., 820 F.2d 376).

PER CURIAM:

Petitioners are correct that neither the bankruptcy court nor the district court made an express or implied finding that the project was sold to a good faith purchaser, and in this respect the opinion of the court is corrected. This does not affect our conclusion because debtors do not challenge the sale of the project or seek reconveyance of the project.

In all other respects the petition for rehearing is DENIED.

APPENDIX 6

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
THEODORE B. GOULD, CHOPIN ASSOCIATES, and
HOLYWELL CORPORATION,
Plaintiffs-Appellants,

v.

BANK OF NEW YORK,
Defendant-Appellee.

MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,
Plaintiffs-Appellants,

v.

BANK OF NEW YORK, *et al.*,
Defendants-Appellees.

March 10, 1988

Before ANDERSON, Circuit Judge, SWYGERT* and GODBOLD**, Senior Circuit Judges.

---

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation. Judge Swygert did not participate in the consideration of these petitions. This order is entered by a quorum. See 28 U.S.C. § 46.

** *See* Rule 34-2, Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ON PETITION FOR REHEARING AND REHEARING EN BANC BY APPELLANTS AND PETITION FOR REHEARING BY APPELLEES

(Opinion June 29, 1987, 11 Cir., 820 F.2d 376)

GODBOLD, Senior Circuit Judge:

On petition for rehearing by appellants/debtors we entered an order on September 8, 1987, 826 F.2d 1010 (11th Cir. 1987), in which we attempted to correct what we believed was an error in our opinion, 820 F.2d 376 (11th Cir.1987). In this order we reaffirmed our conclusion that these consolidated appeals should be dismissed and denied appellants' petition for rehearing. Subsequently the appellants/debtors filed a petition for rehearing en banc, and the appellees filed a petition for rehearing with respect to the September 8 order.

It now appears that our correction was wrong. We have, therefore, gone back to square one and have reviewed the record and the numerous briefs. There are two appeals before us. No. 86-5286 is an appeal from an order of the district court entered in an appeal to it affirming two orders of the bankruptcy court. This appeal to us is the primary subject of this opinion. We hold that the district court should have dismissed the appeal to it as moot, and we remand to the district court with instructions that it do so. No. 86-5386, a related case, is an appeal to us from an order of the district court dismissing a civil action for damages brought in the district court by the debtors in No. 86-5286 against the major creditors. Our disposition of this appeal is controlled by our decision in No. 86-5286. In No. 86-5386 we affirm the district court's dismissal.

The appellants are five Chapter 11 debtors—an individual debtor, Theodore B. Gould, and four other debtors owned, controlled, or dominated by Gould. All have been involved in development of the Miami Center project, a modern thirty-five story hotel and office building

structure, joined by a restaurant and shopping complex, plus a parking garage, situated at a bay-front site in downtown Miami, Florida. The Bank of New York financed the construction of the project and is the principal debtor. Its mortgage fell into default, and it began foreclosure. The five debtors filed voluntary petitions for bankruptcy, and the bankruptcy court consolidated the estates. The debtors continued in possession.

The debtors and the bank filed competing reorganization plans. The creditor committees and individual creditors overwhelmingly approved the bank's amended plan and rejected the debtors' plans. The bank's amended plan included a proposal that the estates of the five debtors be consolidated. The bankruptcy court entered two orders that are central to No. 86-5286. On July 23, 1985 it approved substantive consolidation of the debtors' estates and overruled debtors' objections to that aspect of the reorganization plan. The court noted:

> The consolidation of the five estates is for the purpose of allowing all available funds and assets of the estates to be used in accordance with the Bank's Amended Plan, if confirmed, to pay all allowed creditor's [sic] claims.

The court reserved consideration of whether all other aspects of the reorganization plan entitled it to confirmation.

On August 8, 1985 the bankruptcy court considered whether to confirm the debtors' plans or the bank's plan. The debtors' major objections to the bank's plan were, first, that the assets were worth substantially more than the bank was willing to pay. Second, the Gould interests objected to the provision for consolidation of estates that had been approved in the July 23 order. The court rejected debtors' plans and approved the bank's. In its order, reported as *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy. S.D.Fla.1985), it noted that an application for rehearing

and reconsideration of the July 23 order was pending; the court denied the application for rehearing.

Under the amended reorganization plan that was confirmed a liquidating trustee would be appointed and would take charge of the property. The Bank of New York would acquire the Miami Center property from the trustee, together with the furniture, fixtures, and equipment therein, for $255,600,000, a valuation based upon an MIA appraisal.[1] This purchase would be funded through cancellation of the judgment lien held by the bank (approximately $240 million)[2], plus any new cash necessary to come up to the $255.6 million figure. In addition, the bank agreed to release to the trustee $30 million realized from the sale of unrelated property located in Washington, D.C. that had been owned by some of the debtors; this cash was additional collateral held by the bank and subject to its lien.

Moreover, the bank was required to set aside $14 million, backed by surety bonds, to protect the rights of creditors affiliated with Gould, who had been found in a separate order to be lessors of equipment and fixtures located in Miami Center that had been included with the sale to the bank. This order was the subject of a separate appeal. Should the bond ultimately have to pay the lessors for the FF & E under this arrangement it would be entitled to seek reimbursement from the estate pursuant to a trustee's certificate.

Also the plan provided that certain creditors affiliated with the Gould interests would be "equitably subordinated" to claims of other creditors with lower priority because these Gould-affiliated creditors were "insiders."

---

[1] The furniture, fixtures and equipment had been obtained from affiliates of the debtors pursuant to what the district court, in a separate order, had found to be leases.

[2] In separate proceedings the principal and interest due under the mortgage had been established, and the bank had been granted a final judgment for these amounts.

The debtors had filed in the U.S. District Court a separate suit for damages charging that in connection with its loan the bank had committed fraud and various RICO violations. The approved reorganization plan provided that this case, which the bank asserted was a chose in action of the bankruptcy estate and thus due to be under the control of the trustee, was to be dismissed by the trustee.

Debtors moved in the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing the bankruptcy court granted a stay conditioned upon debtors posting a bond in the amount of $140 million, based upon the court's estimate that an appeal would take a year. In October 1985, on review, the district court reduced the amount of the bond to $50 million, on the assumption an appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. The debtors appealed the bond ruling to this court, which dismissed for lack of jurisdiction. The debtors did not post a bond, and, beginning October 11, 1985, the trustee and the bank set about immediately to consummate the reorganization plan as approved. The trustee conveyed to the bank's designee, a land trust, title to Miami Center and its furniture, fixtures and equipment. The bank gave up its judgment lien, and, in addition, paid approximately $13.6 million of new money, to make up the total consideration of $255.6 million. Also, it released the $30 million of additional cash collateral. The trustee began making payments to 400-plus creditors of the five estates.

On appeal to the district court the debtors attacked the consolidation order and the confirmation order. They asserted that: the necessary bases for the consolidation order were not proved; various of their claims were improperly subordinated to claims of general creditors; the bankruptcy court failed to have a hearing on valuation; the reorganization plan improperly required the trustee

to dismiss the separate suit filed by debtors in the federal district court; the reorganization plan discriminated against mechanics and materialmen and some unsecured creditors; and the bankruptcy court denied debtors' due process.

In November 1985 the bank and the trustee moved to dismiss the appeal to the district court as moot because no stay of the reorganization plan had been obtained.

The district court (Sidney M. Aronovitz, D.J.) held that the consolidation and confirmation orders were "intertwined and independent" and that the order approving the plan of reorganization "includes inferentially the the effect of the [earlier] Order of Substantive Consolidation." With respect to both orders, however, the court held that the bankruptcy court had failed to enter sufficient findings of fact and sufficient explanations of its legal reasoning to support adequate appellate review. The court remanded the matter to the bankruptcy court with directions for it:

> to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits.

Order, p. 12.

Despite its conclusion that there were insufficient findings to support appellate review, the court proceeded to address the appellees' motion to dismiss the appeal for mootness.[3] It looked to the mootness doctrine formerly stated in Bankruptcy Rule 805:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed

---

[3] The trustee had filed a mootness motion but was not a party to the appeal.

> pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

It noted that although the mootness standard was not carried forward in Rule 8005, which supplanted Rule 805 in 1983, it is widely accepted in case law, including *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). Relying upon a Ninth Circuit case, *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), the court held that where a debtor appeals from several orders, some of which are orders approving the sale of property, and fails to obtain a stay, the debtor may proceed with the appeal of orders not involved in the sale. Applying this principle, the district court concluded that the appeal of the consolidation order was not moot because it was not an order of sale, and because, after remand, should it [the district court] rule in favor of debtors on their appeal of the consolidation order, the court could grant meaningful relief to them by reversing that order and "that portion of the confirmation plan of reorganization which incorporates this order." Order, p. 15. Therefore, it held that it would decide the validity of the consolidation order on the merits after receipt of findings of fact and conclusions of law that it ordered entered by the bankruptcy court.

The court then turned to the confirmation order. It did not address the status of the bank as a good faith purchaser within the meaning of the mootness cases. Nor did it speak to its holdings that the consolidation order, though standing alone was not an order approving the sale of property, was an order "involved with the sale" and indeed was "intertwined and interdependent." Rather, as appears from the portions of its order quoted below, the court noted that the purchaser was a designee of the bank and within its jurisdiction, and it analyzed its

ability to give "effective relief" by considering whether it was capable of undoing what had been done. The court stated that it could reverse its subordination of debtors' claims and return them to their pre-confirmation status; it could require the trustee to reinstate the separate suit that debtors had filed; and it could review alleged procedural flaws in the valuation proceedings leading up to confirmation and in other unspecified proceedings. The court put its finger on the central dispute:

> This appeal is primarily directed at recovering title to the Miami Center property held by the bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above [the rulings in the confirmation order].

Ms. Op. p. 17.

As to this central matter, the court held:

> [S]hould this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone.

Id. at p. 18.

* * * *

> Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on the remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million ($30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors. The Bank of New York would be returned to its position as chief secured creditor, and could either propose a different plan of

> reorganization before the bankruptcy court or pursue remedies available to it as mortgagee. The appellants would be returned to the status of debtors in possession of the property, and could likewise attempt to obtain creditor approval for an alternate plan while seeking a buyer for the Miami Center which would be willing to pay what the debtors contend is the property's true value.

Id. at pp. 18-19.

Upon application by the bank the district court certified to this court under 28 U.S.C. § 1292(b) the issue of whether the appeal to it was moot. This court declined to accept the case.

On remand, on the consolidation issue, the bankruptcy court conducted a hearing, took evidence, and heard argument. On the confirmation issues it invited evidence. None was tendered except on valuation and calculation of the amount of the bank's lien.

The bankruptcy court entered lengthy findings and conclusions,[4] which included:

> 1. Holdings rejected the debtors' reorganization plans because, among other reasons, the debtors had

---

[4] In this court, as in the district court, the debtors question the bankruptcy court's having adopted *in toto* proposed findings and conclusions submitted by the bank. The bankruptcy judge asked, and received, proposed findings from the debtors and from the bank. He adopted those from the bank. Debtors question this procedure (as has this court, *Cabriolet Porsche-Audi, Inc. v. American Honda Motor Company*, 773 F.2d 1193, 1198 n. 2 (11th Cir. 1985)), but this does not render the findings and conclusions invalid. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The district court examined the findings under the plainly erroneous rule and affirmed them. We review them as relevant to the mootness issue. Examining them in that constricted scope, we find no error.

no buyer and they were in litigation on nearly every front.[5]

2. Elaborate findings on relations between the debtors that supported the requirement of consolidation.

3. Detailed findings of improprieties involving the Gould interests that justified subordination of various of the Gould-related claims.

4. As to valuation, that under one approach debtors' valuation was higher than that of the MIA appraiser presented by the bank but the debtors had produced no purchaser willing to pay the higher figure, and that under another approach the valuations of debtors and the MIA appraiser were very near the same.

Following these findings and conclusions the court held:

> Based upon all of the foregoing, the Court finds that the $255.6 million purchase price offered by the Bank for the Project (including the FF & E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

With respect to the separate suit, the court found it had no significant value because debtors had executed releases as to transactions between them and the bank; rather the suit was a detriment to the estate because of the attorney fees it was generating.

The court also found that it had had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its "fairness, feasibility and propriety" had been verified by these occurrences: administrative claims had been paid or reserved; secured

---

[5] Including the City of Miami, IRS, the general contractor, their former lawyers, the former operator and the leasing agent for the hotel, and prospective tenants for the office building.

claims had been paid in full; class 3 claims had been paid in full; undisputed claims in classes 4 through 6 had been paid in full and funds reserved for disputed claims; several disputed claims had been compromised, saving the estates millions of dollars; there remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (many of which were unliquidated).

Finally the court went on to hold:

> No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

With respect to consolidation, the court found the facts, and applied the controlling law, at length. It found that in most respects creditors had not objected to consolidation, that the debtors would not be substantially prejudiced by consolidation, and that the hundreds of creditors (many not represented by counsel) should not be required "to engage in a shell game" in attempting to determine which of the interrelated debtors involved in the Miami Center project would be able to pay them. The difficulty in tracing the obligation of claims against the affiliated creditors was, the court held, "completely attributable to the labyrinth that Gould has created."

The bankruptcy court confirmed the orders it previously had entered. The matter came back to the district court with the bankruptcy court's elaborate findings and conclusions. Without addressing the mootness issue the court considered the merits and entered an order on March 20, 1986. It held that the confirmation order before it for review consisted of the initial confirmation order [entered August 8, 1985], as amended by the find-

ings of fact and conclusions of law entered by the bankruptcy court on remand. It reiterated that the confirmation order and the consolidation order were "intertwined and interdependent." With respect to each issue relating to confirmation, including valuation, the district court reviewed the facts as found by the bankruptcy court and the applicable law and found no error. Following this careful, point-by-point review, the district court affirmed the August 8 confirmation order, as amended by the bankruptcy court's order on remand, and affirmed the order approving consolidation.

Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand.[6]

The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but this provision applies only to the sale of the debtor's property by the trustee pursuant to § 363(b) or (c). Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation. All parties agree that in this case we look for guidance to the case law.

The Eleventh Circuit, like other circuits, has recognized the continuing viability and applicability of the mootness standard in situations other than transfers by a trustee under § 363(b) or (c). *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir.1985).

---

[6] *See In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir. 1983) (no explicit holding by bankruptcy court on good faith purchaser issue. District court remanded to the bankruptcy court for findings, and that court ruled good faith purchaser status applied. District court adopted this determination and dismissed the appeal).

In *Sewanee* the mortgagees/creditors were permitted to foreclose, both district and circuit courts refused stay pending appeal, and the property was sold at foreclosure to the creditors. On appeal debtors asserted the sale should be rescinded and the property returned to them. Looking to the case law, this court dismissed the appeal as moot. *Markstein* is similar to *Sewanee*. No stay was obtained. Mortgagess/creditors purchased the property themselves at foreclosure. On appeal the debtors sought to have the sale rescinded and the property returned, or other equitable relief. This court held that it was powerless to rescind the sale. It ordered a limited remand to the district court with direction that it make specific findings as to the amount of the mortgage debt and to determine whether the bankrupt estate was entitled to excess, if any, of the foreclosure bid over the debt. The court noted that the appellant had been unable to locate, "any case where a court has granted relief in the situation where property of a debtor was sold at foreclosure to a good-faith purchaser after the debtor had failed to obtain a stay of foreclosure pending appeal." But it had found no case where the amount of the mortgage debt, and of the excess, if any, had not specifically been determined, thus it remanded on these issues. 763 F.2d at 1327 n. 1. No such issue is involved in the present case. With respect to the purpose of the mootness rule, the court held:

> This rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sales process upon which good faith purchasers relied.

Id. at 1327.

Matos follows in the same channel. The bankruptcy court permitted foreclosure, debtors were granted a stay conditioned on filing a bond, which they did not file. The

mortgagee/creditor bought the property at foreclosure. This court dismissed the appeal as moot. We said:

> It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal. *Markstein v. Massey Associates*, 763 F.2d 1325 (11th Cir.1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). This rule of law, which is permised upon considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant relief on appeal even if the purchaser of the property is a party to the appeal, is fully applicable to this case. Accordingly, the appeal must be dismissed as moot. (Note omitted.)

790 F.2d at 865-66.

The "good faith purchaser" is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim. *In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir. 1983); *Greylock Glen Corporation v. Community Savings Bank*, 656 F.2d 1 (1st Cir.1981). Knowledge of claims asserted in a pending appeal does not deprive a purchaser of good faith status. *In re Dutch Inn of Orlando, Ltd.*, 614 F.2d 504 (5th Cir.1980).

When the present case was returned to the district court following remand, the record before the district court included the finding that the bank was a good faith purchaser. It included the detailed findings that the plan was fair, feasible, and proper, and that it had been substantially consummated. And it included the finding that it was legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo. All these findings were affirmed.

The debtors urge, on several grounds, that the mootness standard should not apply:

(1) The mootness rule has no applicability because there has been no transfer to a third party. This argument ties in with the district court's emphasis on the fact that the sale was to a designee of the bank which was within the jurisdiction of the court. No transfer to a third party was involved in *Sewanee*, *Markstein*, or *Matos;* in each of those cases the purchaser at foreclosure was the mortgagee/creditor, just as the bank here is the purchaser from the liquidating trustee. Other cases rejecting the "not a third party" argument include *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir.1985); *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir.1981) ("[T]he fact that the bank was both the seller and purchaser of the property, and a party to the dismissed appeal does not affect its status under Rule 805. The rule does not distinguish between mortgage holders and other potential purchasers of encumbered property. It is designed to give finality to orders of the bankruptcy court that have not been stayed pending appeal. . . . No less than any other potential purchaser, the bank was entitled to bid upon the Greylock Glen property with the assurance that its title to the property would not be affected by appellate review months or even years later.")

(2) The bank has never been held to be a purchaser in good faith. On remand the bankruptcy court held the bank was a good faith purchaser, and the district court affirmed the bankruptcy court's findings and affirmed the confirmation order, as amended by the bankruptcy court's findings and conclusions. No factual argument is advanced why the bank is not entitled to good faith purchaser status except that the purchaser is a designee of the bank and within the jurisdiction of the court, an argument already rejected above.

(3) The mootness principle is inapplicable because the debtors do not seek return of the property but only modification of the plan, or, restating, they do not attack the sale but only matters that do not directly relate to the sale.

(4) Mootness does not apply where the purchaser has not taken irrevocable steps in reliance on the purchase.

Points (3) and (4) require us to look beyond *Sewanee*, *Markstein* and *Matos*. These three Eleventh Circuit cases concern single sales at foreclosure of property for which in each instance there was a good faith purchaser. In that confined context the cases are a firm application by this circuit of a broader principle that mootness is appropriate where a court cannot give effective relief. A reorganization case, however, may sweep within its ambit more than a discrete and consummated sale to a good faith purchaser. Within a penumbra of the reorganization plan outside of discrete consummated sales there may be aspects of the reorganization that are not moot.[7] Cases of this nature include *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir.1977); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir.1986); and *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981). These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substan-

[7] The possibility of effective relief for matters unrelated to consummated sales does not, however, subsume the central principle that finality of judgments and certainty are to be protected where there have been sales to good faith purchasers. In this case the district court considered as a global question whether it could grant effective relief and concluded that it could do so because it had the power to undo the sale to the bank, restore the property and possession to the debtor, and set aside the sale provision of the reorganization plan. This analysis stood the law of mootness on its head.

tially consummated, and whether there has been a comprehensive change in circumstances. *AOV*, 792 F.2d at 1148-49. The court will not, however, allow a "piecemeal dismantling" of a reorganization plan. *Id.* at 1149. In *AOV* the court recognized a "strong presumption" of mootness. *Id.* The court may consider whether relief granted by the court could implicate or have an adverse effect on non-party creditors and will affect the re-emergence of the debtor as a revitalized entity. *Id.* In *Roberts Farm* the court considered whether the property transactions "stand independently and apart from the plan of arrangement," and found that "the many intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand *solely* upon the order confirming the plan of arrangement for court approval and confirmation of the transactions." 652 F.2d at 979. The court concluded that to deny mootness and reverse would "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.* The Eighth Circuit, *In re Information Dialogues*, 662 F.2d 475 (8th Cir.1981), refers to the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. In *Matter of National Homeowners Sales Service Corp.*, 554 F.2d 636 (4th Cir.1977) the Fourth Circuit, in sustaining good faith purchaser status and dismissing the appeal as moot, relied upon substantial investment that had been made upon reliance of good title to the property having vested in the purchaser.

The debtors acknowledge that the plan of reorganization has been substantially consummated, but, they say, it remains not completed in several respects, as follows: The trustee is claiming substantial additional sums from the bank as a result of examination and audit of the

bank's interest charges and other closing adjustments in the sale of the Miami Center property. If the bank must pay the lessors for FF & E, it will seek repayment from the estate pursuant to the trustee's certificate, which will deplete sums available to Gould-affiliated creditors. Some disputed claims have yet to be resolved. It is unknown whether claims of Gould-affiliated creditors will be paid in full because some have been assigned a junior priority.

We turn, then, to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some "super priority" ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.

The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received as part of the reorganization plan, and the consequences of the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good stand-

ing" interest rates; by agreeing to this calculation the bank surrendered a claim to $5 million§$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totalling approximately $30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or re-

jected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its $12.5 million or get back the $30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorneys fees for its defense.

All of this demonstrates that the consequences of what debtors seek strike at the sale of the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not "stand independently and apart from the plan of arrangement," but rather "the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand *solely* upon the order confirming the plan of arrangement." 652 F.2d at 797.[8] It is "impossible to fashion effective relief" for the bank. *Id.* Granting the remedies the debtors seek would "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.*

The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan

---

[8] The district court found twice that the consolidation order and the confirmation order were intertwined and independent.

had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation. The district court was required to dismiss the appeal as moot.

We turn to No. 86-5386: The district court held that the bankruptcy court had the power to order the trustee to dismiss the separate fraud/RICO case because: (1) it was a chose in action which was part of the debtors' estate; (2) on remand the bankruptcy court had conducted a cost/benefit analysis of the value of the suit and concluded that its value was nil; (3) evidence adduced at a post-remand hearing showed that releases previously signed by debtors barred their pursuing the civil action on principles of collateral estoppel.[9]

Judge Aronovitz entered his order affirming the consolidation and confirmation orders on March 20, 1986. On April 30, 1986 District Judge Hoeveler dismissed the fraud/RICO suit, quoting the grounds set out above and, accordingly, entered a dismissal as "an adminisrtative necessity . . . compelled by the decision of the Bankruptcy Court below and the affirmation of that decision by Judge Aronovitz."

Had the appeal to the district court on the consolidation and confirmation orders been dismissed as moot, as it should have been the judgment of the bankruptcy court in that appeal would have become final. The issues adjudicated by that judgment would then have been precluded from reexamination by Judge Hoeveler in his con-

---

[9] The bankruptcy court held that it was within the scope of its authority in making this determination because the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmation of plans, and/or other proceedings, affecting the liquidation of the assets of the estate, and therefore constituted a "core proceeding."

sideration of whether to dismiss the fraud/RICO case. These same consequences will ensue now upon the entry of an order by Judge Aronovitz dismissing the appeal from the bankruptcy court as moot.

The debtors contend that as a matter of separation of powers the bankruptcy court could not require the district court to give up its jurisdiction. This is not what happened. In October 1985, some five months before Judge Aronovitz affirmed the bankruptcy court, the liquidating trustee, on behalf of the debtors, filed a "stipulation" for dismissal with prejudice of the district court case. All parties asked that consideration of the trustee's "motion" to dismiss be postponed until the bulk of the bankruputcy proceedings had been resolved.

After Judge Aronovitz entered his ruling and plaintiffs failed to post an appeal bond to stay the implementation of the reorganization plan pending appeal to this court, the liquidating trustee filed a new motion requesting the court to order dismissal of the district court case. Thus, the liquidating trustee, found by the bankruptcy court to be in control of the separate case as an asset of the debtors' estates, was directed to dismiss the separate suit, he sought to have it dismissed, and Judge Hoeveler responded by entering a dismissal. Dismissal of lawsuits that are assets of the estate is a not-unfamiliar feature of reorganization plans. Debtors' suggestion that the bankruptcy court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense. The underpinnings of the bankruptcy court's order to the trustee will be finally determined by the bankruptcy court order once the finality of that order is established by the mootness of the appeal to the district court. As now recognized, though retrospectively, the district court's order dismissing the separate suit, as requested by the trustee, will be correct and will be due to be affirmed.

Conclusion

We VACATE the order of September 8, 1987 appearing at 826 F.2d 1010.

In No. 86-5286 we VACATE the judgment of the district court affirming the consolidation order and the confirmation order of the bankruptcy court and REMAND that case to the district court with instructions to dismiss the appeal to it from the bankruptcy court as moot.

Forthwith upon entry of the order by the district court, as directed in No. 86-5286, the judgment in No. 86-5386 shall stand AFFIRMED.

The petiton for rehearing by the Bank of New York is DENIED. The petition for rehearing by the appellants is DENIED.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

APPENDIX 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-3225-Civ-Aronovitz

Bk. Nos: 85-01590-BKC-TCB
85-01591-BKC-TCB
85-01592-BKC-TCB
85-01593-BKC-TCB
85-01594-BKC-TCB

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,
Appellants/(Debtors),

vs.

BANK OF NEW YORK,
Appellee/(Principal Creditor).

ORDER OF REMAND AND DENIAL OF MOTION TO DISMISS

This is an appeal from Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of Florida. Appellants (five) Chapter 11 debtors in the proceeding below, appeal from two orders of the bankruptcy judge:

a.) an order approving the substantive consolidation of the debtors' estates; and,

b.) the trial court's order confirming the plan or reorganization proposed by the Bank of New York, the major creditor of the debtors' estates and the appellee herein.

Both rulings are intertwined and interdependent. Also before the Court are two motions filed by the appellee and by the liquidating trustee appointed under the confirmed plan which seek to dismiss this appeal on the grounds of mootness.

The five debtors who initiated the Chapter 11 proceedings below and those estates were consolidated by order of the Bankruptcy Judge, Thomas C. Britton are:

> Miami Center Limited Partnership (hereinafter "MCLP"), which developed the Miami Center Project;
>
> Chopin Associates, the owner of the land, leased to MCLP, upon which the facility was built;
>
> Holywell Corporation, an entity involved in servicing and holding real property;
>
> Miami Center Corporation, a subsidiary of Holywell Corporation; and
>
> Theodore B. Gould, the sole shareholder of Holywell Corporation, president of the Miami Center Corporation, and a general partner of both Chopin Associates and the Miami Center Limited Partnership.

The Bank of New York, the appellee, was the primary secured creditor of the debtors, having advanced over Two Hundred Million ($200,000,000) Dollars in mortgage loans for the purchase and construction of the Miami Center Project.

Involved in these proceedings, among other assets of the debtors and the claims of various other creditors, is property known as the Miami Center, situated at a bayfront site in downtown Miami, Florida (roughly South of Bayfront Park). The Miami Center, the debtors' major asset, consists of a modern 35-story hotel (The Pavillon) and office building structure (Edward Ball Building) with two towers joined by a restaurant and

shopping complex known as the Podium. The hotel and office facilities were furnished with furniture, fixtures and equipment (FF&E) which were leased from some affiliated creditors of the debtors. Construction and management of the Miami Center was the responsibility of MCLP. (Four additional vacant lots (blocks) adjacent to the debtors' property are owned by the Miami Center Joint Venture, which is not a debtor in these proceedings. Thus, these four blocks were not included in the debtors' estates for purposes of reorganization.)

HISTORY OF THE CHAPTER 11 PROCEEDINGS

Due to substantial disagreements among the five debtors and the Bank of New York over the priority to be given to the latter's mortgage loans vis-a-vis subsequent financing arrangements made by the debtors, the Bank declared its mortgage loans secured by the Miami Center property to be in default in early 1984, and filed foreclosure proceeding against the property on July 27, 1984. All five debtors thereupon filed petitions under Chapter 11 of the Bankruptcy Code in the court below. Between the initial filing of those petitions on August 22, 1984 and the issuance of the court's final order of confirmation on August 8, 1985, Judge Britton considered and ruled upon a myriad of motions and other matters, as can be seen by the voluminous record before this Court on appeal. Appellants here challenge the bankruptcy court's rulings on two of the most significant of these rulings:

1. The July 23, 1985 Order Approving the Substantive Consolidation of the Debtors' Estates (Court Paper #840).[1]

---

[1] Substantive consolidation, in the context of a Chapter 11 proceeding, entails much more than the mere procedural consolidation contemplated by *Fed.R.Bankr.P.* 1015. As the advisory committee note to that rule explains, the substantive combination of the estates of various debtors is only sometimes appropriate, depending upon the factual circumstances of the case. Substantive consolida-

2. The August 8, 1985 Final Order of Confirmation, confirming the plan of reorganization of the appellee Bank of New York (Court Paper #906).

The major components of the plan approved by the court below are as follows:

—The Bank would acquire the entire Miami Center Project Property, including the furniture, fixtures and equipment (FF&E) for the sum of Two Hundred Fifty-five Million, Six Hundred Thousand ($255,600,000) Dollars. (This figure is based on a valuation of the property performed by Charles V. Failla & Associates and commissioned by the Bank of New York. Appellants contest the validity of this appraisal and the fact that the court below did not hold hearings thereon.) This acquisition would be funded through the net amount already owed to the appellee by the debtors—approximately Two Hundred Forty Million ($240,000,000) Dollars—to which would be added Thirty Million ($30,000,000) Dollars realized through the sale by debtors Holywell and Gould of certain unrelated, distinct real property in Washington, D.C. This latter sum of Thirty Million ($30,000,000) Dollars has been held and maintained as additional collateral by the Bank in a separate collateral account. (See Judge Britton's Order of December 31, 1984. Court Paper #303.)

—The liquidating trustee, to be appointed under the Plan, would have effective control over the operations of the Miami Center, ousting the debtors in possession. In addition, the trustee would be required by the terms of the Plan to voluntarily dismiss the civil suit filed by the debtor/appellants in

---

tion has been defined as an equitable remedy in which "the assets or liability of different entitites are consolidated and dealt with as if the assets were held by, and the liabilities incurred by, a single entity."' *Matter of Luth*, 28 B.R. 564, 566 (D. Idaho 1983), *citing* 5 Collier on Bankruptcy, p. 1100-32, (15th Ed. 1980).

this Court, Case No. 85-0228-Civ-Hoeveler, which sought damages against appellee for breaches of its loan agreements, violations of the federal RICO statute, and other actions.

—The Bank would set aside Fifteen Million ($15,000,000) Dollars, backed by surety bonds, for two creditors who had leased the equipment and fixtures to the MCLP. (The ruling is under separate appeal by the Bank of New York in this Court before the Honorable C. Clyde Atkins who required this sum in the nature of a Supersedeas Bond.)

—The claims of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing Company, affiliated creditors who had leased the FF&E to the Miami Center owners, would be equitably subordinated to those of other creditors with lower priority on the grounds these creditors were "insiders".

—The Bank's Plan further required the substantive consolidation of the estates of the five debtors/appellants. *See* f.n.[1], *supra.*

The substance of the two orders appealed from by the debtors is discussed below. (In actuality the Order approving Plan of Reorganization includes inferentially the effect of the Order of Substantive Consolidation.) Attached to this opinion for reference is a copy of each of these Orders, as well as an excerpt from the transcript of the hearing on substantive consolidation held before Judge Britton on July 18, 1985, which can be deemed to supplement the judge's two-page Order on Substantive Consolidation entered on July 23, 1985.

THE SCOPE OF REVIEW AND NECESSITY OF ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is settled beyond dispute that a district court, in deciding an appeal from a bankruptcy court's ruling, must accord substantial deference to the trial court's findings of fact, reversing these only when they are "clearly erroneous". *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. *Matter of Multiponics*, 622 F.2d 709, 713 (5th Cir. 1980). There is authority holding that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. *Watson v. Thompson*, 456 F.Supp. 432, 436 (S.D. Ga. 1978).

The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceeding below and the basis for the trial court's ruling, but it ensures that trial courts enage in a carefully reasoned analysis of each case. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 432 (5th Cir. 1977). The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 52(a). Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed.R.Bankr.P.* 7052,[2]

---

[2] Rule 7052 has not been affected by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (July 10, 1984), and is widely cited by courts in their most recent decisions in the bankruptcy area. *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985); *In Re Fossum*, 764 F.2d 520 (8th Cir. 1985); *Judson v. Levine*, 50 B.R. 587 (S.D. Fla. 1985).

which requires the bankruptcy court to enter findings of fact and conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation at issue here were *adversary* proceedings as that term is defined in *Fed.R.Bankr.P.* 7001. These hearings below were "contested" matters as hereinafter defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed.R.Civ.P.* 52(a) are nonetheless applicable to the instant appeal.

Fed.R.Bankr.P. 9014 extends the application of Rule 7052 to "contested matters" and encompasses, (*See* Advisory Notes to Rule 9014), the debtors' objections to the trial court's order on substantive consolidation. The appellants' objection to the final order of confirmation is explictly made subject to Rule 9014 by *Fed.R.Bankr.P.* 3020(b). Thus, the Bankrupcty Judge should have made and entered clear and concise findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review. Actually, findings and conclusions are almost nonexistent or absent, and to such extent that in this case this Court does not consider that review by discarding the "clearly erroneous" standard and proceeding "*de novo*" should be undertaken.

THE GROUNDS OF THE DEBTORS' APPEAL

In their appeal to this Court, the appellants state the following substantive grounds for their appeal:

1.) that the equitable subordination of the claims of creditors Miami Center Joint Venture, Holywell Leasing Co. and Holywell Telecommunications Co. was error, both substantively (since their leases were determined to be "true leases",

thus meriting their treatment as outside creditors) and procedurally (since no hearing was held on the subject of equitable subordination).

2.) that the substantive consolidation of the estates of the five debtors was error, in that the Bank of New York failed to carry its burden of proving the necessity of such consolidation and because two of the five debtors were solvent at the time of the bankruptcy court's order.

3.) that the bankruptcy court's failure to hold a hearing on the validity of the valuation of the Miami Center project which the Bank of New York submitted was reversible error.

4.) that the bankruptcy court's action in upholding that portion of Bank's plan which directs the liquidating trustee to dismiss the debtors' pending civil suit against the appellee is unconstitutional in that it allows a non-Article III court to remove a case from the jurisdiction of this court.

5.) that the Bank's plan, as confirmed by the bankruptcy court, unfairly discriminates against certain equally situated unsecured creditors by favoring one (i.e. Holywell Corporation) in violation of 11 U.S.C. 1129(b).

6.) that the approved plan wrongly subordinates the claims of certain mechanics and materialmen.

7.) that the bankruptcy court denied the debtors due process by refusing their requests for hearings on various amendments to the Bank's proposed plan of reorganization and for adequate disclosure by the Bank of such amendments.

As to each of these grounds, this Court has been left with the impeded, if not impossible, task of trying to apply a "clearly erroneous" standard of review to find-

ings of fact that are either non-existent or too vague to support adequate review. As the Fifth Circuit noted in *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975), "findings that are nothing more than broad general statements, stripped of underlying analysis or justification shedding some light on the reasoning employed, makes it impossible for [an appellate court] to give meaningful review to the judgment." *Id.* at 207. For example, in his order approving the substantive consolidation of the debtors' estates, the bankruptcy judge supported his ruling with the following statement: "The Court finds that the legal relationships among the debtors and the facts in this record support the substantive consolidation of the estates . . ." Order of July 23, 1985 (Court Paper # 840. (*See* Appendix A.)

In the bankruptcy court's order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it does, significant rights and interests of creditors and debtors alike. The plan consists of many complex provisions, some of which form the basis of this appeal. Yet, in his five page order approving this complicated plan which would determine the disposition of over Three Hundred Million ($300,000,000) Dollars in assets, the bankruptcy court provided no more explanation of its decision to approve the plan than a statement that the plan "meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b)." Final Order of Confirmation, dated August 8, 1985 (Court Paper # 906). In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these order was required.

To support its order of substantive consolidation, for instance, the trial court would have had to find the existence of certain, widely accepted factors which justify

this extraordinary remedy which, if employed inappropriately, can result in unfair treatment of both debtors and creditors. *In re Flora Mir*, 432 F.2d 1060 (2nd Cir. 1970). Those factors are set out in *In Re Donut Queen*, 41 B.R. 706, 709 (S.D.N.Y. 1984) and include the following:

1. The presence or absence of consolidated financial statements.

2. The unity of interests and ownership between the various corporate entities.

3. The existence of parent and intercorporate guarantees on loans.

4. The degree of difficulty in segregating and ascertaining individual assets and liabilities.

5. The commingling of assets without formal observance of corporate formalities.

6. The commingling of assets and business functions.

7. The profitability of consolidation at a single physical location.

In the same manner, a bankruptcy court, before it can justly order the equitable subordination of otherwise prior claims must first find that the following three tests are satisfied:

1. The claimant must have engaged in some type of inequitable conduct.

2. The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.

3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Matter of Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977).

It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court. Faced with the same situation, (lack of adequate findings of fact on appeal from an order of equitable subordination), the Fifth Circuit Court in *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 296 (5th Cir. 1983) remanded the matter to the bankruptcy court, explaining that "we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the [appellee] has discharged his burden of proof thereunder." *Id.* at 212.

The Court fully acknowledged that a trial judge, in ruling on a matter governed by the requirements of *Fed. R.Civ.P.* 52, is not held to any formalistic style in preserving his findings, such as numbered paragraphs. All that is required is that the factual and legal basis of every significant ruling be stated in a clear and understandable manner which permits the reviewing court to fairly decide any appeal which may emanate from that ruling. The record before this Court in this instant appeal fails to meet this standard.

There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded. It seems evident that whenever necessary, upon remand, the bankruptcy court should review and consider the advisability of holding additional evidentiary hearings. At the very least, the bankruptcy court should require each party to list, in writing, any further evidentiary hearings they deem to be necessary. The bank-

ruptcy judge can then review these requests to determine and then hold evidentiary hearings on any such requests

It is therefore

ORDERED AND ADJUDGED that this matter be, and the same is, hereby REMANDED to the United States Bankruptcy Court for the Southern District of Florida, to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits. This should all be accomplished WITHIN THIRTY (30) DAYS herefrom.

THE DEBTORS' APPEAL IS NOT SUBJECT TO DISMISSAL FOR MOOTNESS

Earlier in this opinion, the Court examined the substantive elements of this appeal and the necessity of a remand to the bankruptcy court for the complete findings of fact and conclusions of law required by the applicable rules of procedure. The Court's discussion of those substantive issues makes it clear that the debtors' appeal is not a frivolous one and that, absent compelling cause, the interests of justice would best be served by allowing the appellants an opportunity to present their appeal from a fully developed record below.

The debtors made several efforts to obtain a stay of the bankruptcy's court's orders pending the outcome of this appeal. The bankruptcy court, in its order of September 27, 1985, agreed to grant such a stay on the condition that the debtors post a supersedeas bond in the amount of One Hundred Forty Million ($140,000,000) Dollars. The debtors thereupon took an emergency appeal to this Court from the bankruptcy court's stay order. The appeal was heard by Chief Judge James Lawrence King, who affirmed the bankruptcy court's grant of a stay, but reduced the amount of the supersedeas bond required to

Fifty Million ($50,000,000) Dollars to be posted on or before October 10, 1985. Appellants then took an appeal from the district court's order to the Eleventh Circuit Court of Appeals, which appeal was dismissed by that court for lack of jurisdiction on October 9, 1985. Upon the debtors' failure to post the required bond, the bankruptcy court's stay terminated on October 10, 1985.

The Bank of New York, appellee in this cause, has moved to dismiss the appeal of Holywell Corporation and the other appellants on the ground that their appeal has been rendered moot by the appellants' failure, after several attempts, to obtain a stay of the implementation of the confirmation order pending this appeal. (A similar motion has been filed by the liquidating trustee, who is not a party to this appeal.) The appellee bases its motion to dismiss upon the "mootness doctrine" first codified in former Bankruptcy Rule 805 and followed by a significant number of decisions by courts throughout the United States. Rule 805 states, in pertinent part:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

Fed.R.Bankr.P. 8005, which replaced Rule 805 in 1983, does not contain any reference to the mootness standard of the previous rule. While that standard is preserved in the current bankruptcy code at 11 U.S.C. § 363(m), this statute applies the mootness doctrine only to the sale of the debtor's property by the trustee or the debtor himself. Where, as here, the debtors' assets have been sold by the liquidating trustee, § 363(m) is not applicable.

In the absence of a controlling statutory standard, this court must look to the applicable case law for guidance,

as the Eleventh Circuit Court of Appeals did in *In Re Sewanee Land, Coal and Cattle Company*, 735 F.2d 1294, 1296 (11th Cir. 1984). A survey of recent decisions regarding bankruptcy appeals filed without procurement of a stay of the proceedings below shows that the "mootness doctrine" stated by former Rule 805 is still widely accepted by courts throughout the United States. *See, e.g., Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985); *In re Sewanee Land, Coal and Cattle Co., supra; In Re Bel Aire Associates*, 706 F.2d 301 (10th Cir. 1983); *Greylock Glen v. Community Savings Bank*, 656 F.2d 1 (1st Cir. 1981). In each of these cases, however, the trial court order from which an appeal was taken was one approving the sale of the debtor's property. Indeed, the text of former Rule 805, to which these decisions refer, is specifically directed to "an order approving a sale of property." Where a bankruptcy court's order concerns matters other than the sale of property, the mootness doctrine may not apply. Thus, in *In Re Berg*, 45 B.R. 899 (Bankr. App. 1984), the Bankruptcy Appellate Panel of the Ninth Circuit ruled that the mootness standard embodied in former Rule 805 did not apply to an appeal from an order quieting title in the debtor's property, even where such property had been sold by the trustees and the proceeds distributed.

In an earlier decision, the Court of Appeals for the Ninth Circuit held that where a debtor appeals from several orders of the bankruptcy court, some of which are orders approving the sale of property, the debtor may appeal those orders not involved with the sale even in the absence of a stay. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). While the *Combined Metals* court considered appeals from ten separate orders of the bankruptcy court, Holywell Corporation and the other appellants before this Court appeal from only two orders issued by Judge Britton in the proceedings below: the July 23, 1985 Order Approving Substantive Con-

solidation, and the Final Confirmation Order entered on August 8, 1985.

The order regarding substantitve consolidation is clearly not one approving a sale of property; rather, it requires that the estates of the five debtors be combined to facilitate payments to their creditors. Should this court rule, after remand of this matter, in favor of the appellants on their appeal from the consolidation order, it can grant meaningful relief to the appellants by reversing the order, and that portion of the confirmed plan of reorganization which incorporates this order. For these reasons, the debtors' appeal of the bankruptcy court's order approving substantive consolidation is not moot, and will be decided by this court on its merits upon receipt of the findings of fact and conclusions of law ordered from the bankruptcy court.

The greater part of the present appeal concerns the Final Order of Confirmation and specific aspects thereof: the equitable subordination of certain creditors' claims, the requirement that the liquidating trustee dismiss the appellants civil suit, the validity of the estate valuation upon which the plan is based, and alleged procedural deficiencies in the conduct of the confirmation proceedings. Of course, the heart of the confirmed plan is the sale, *by the liquidating trustee*, of the Miami Center property for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand ($255,600,000) Dollars. The appellee contends that Judge Britton's order confirming the Bank's Plan of Reorganization, and hence this sale, is shielded from appellate review by the "mootness doctrine" of Rule 805 and the applicable case law.

The touchstone of those decisions, and of all determinations that a given suit or appeal is moot, is not the presence or absence of a single factual element (e.g., a sale of property). Rather, the fundamental criterion for judging whether a case on appeal has become moot has consistently been whether the appellate court has been ren-

dered incapable of granting effective relief to a petitioner due to a change in the circumstances of the case. *Mills v. Green*, 159 U.S. 651, 16 S. Ct. 132 (1895).

In the appeal before this court, the parties have informed the court that certain transactions have already taken place in accordance with the confirmation order issued below. The Miami Center property has been transferred by the liquidating trustee *to a designee of the appellee*, and certain claimants in classes three through six of the reorganization plan have been paid. The appellants, however, have frequently stated their approval of the payments made to such third-party creditors, and their intention that such claimants be satisfied regardless of the dispute between themselves and the appellee. This appeal is primarily directed at recovering title to the Miami Center property held by the Bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above.

A crucial determination to be made is whether, accepting various actions have been taken by the liquidating trustee in reliance on the bankruptcy court's confirmation order, can effective relief be granted to the appellants should this Court decide, after the appeal is reinstated post-remand, that their appeal has merit? In determining that it is capable of granting such relief, this court has considered each of the points raised by the present appeal.

Reversal of the bankruptcy court's ruling on the equitable subordination of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, Inc., would likewise return these entities to their pre-confirmation status; here, this would result in the three creditors being given the higher priority for their claims accorded to "arm's length" creditors. Denial of the liquidating trustee's authority to dismiss the appellants' district court suit would simply allow the action to remain viable, and review of the alleged procedural flaws in the valuation and

other procedings below would, at most, necessitate further hearings on those matters. Thus, the posture of this appeal, at least as it concerns the points of appeal discussed here, is by no means such that events have rendered meaningful review impossible.

Finally, and most significantly, should this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone. The property was sold *not* to a disinterested, third-party purchaser, but to the appellee itself, through its designee, for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand ($255,600,000) Dollars. This purchase price was satisfied by the Bank by combining the debtors' outstanding mortgage obligations to the Bank with Thirty Million ($30,000,000) Dollars in cash collateral which was derived through a sale, by the debtors, of certain Washington, D.C. property. Much of this latter cash fund has already been applied to pay the claims of certain secured creditors, which use the appellants have approved. Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million ($30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors. The Bank of New York would be returned to its position as chief secured creditor, and could either propose a different plan of reoraganization before the bankruptcy court or pursue remedies available to it as mortgagee. The appellants would be returned to the status of debtors in possession of the property, and could likewise attempt to obtain creditor approval for an alternate plan while seeking a buyer for the Miami

Center which would be willing to pay what the debtors contend is the property's true value.

This Court may ultimately reject the appeal presented by the debtors and uphold the bankruptcy court's orders on substantive consolidation and confirmation of the Bank of New York's plan. Today's opinion merely constitutes the court's determination that the appeal is a viable one, and that the court, should it determine that the appellants' requested relief, or other suitable remedy, is appropriate, would be able to grant it. Before any determination of the merits of this appeal can be made, however, the court must await the result of its remand of this matter to the trial court for his provision of findings of fact and conclusions of law which will enable this court to make a fair and informed judgment of the merits of the appeal.

For the foregoing reasons, it is

ORDERED and ADJUDGED that the appellee's motion to dismiss be, and the same is, hereby DENIED.[3]

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 30 day of DECEMBER 1985.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

Copy furnished to:

S. Harvey Ziegler, Esq.
Thomas F. Noone, Esq., (New York, N.Y.)
Vance E. Salter, Esq.
Fred H. Kent, Esq.
Raymond W. Bergan, Esq (Wash., D.C.)
Irving M. Wolff, Esq.

---

[3] There are several other appeals now pending in the United States District Court from the bankruptcy judge's rulings. These are before other judges, including two before Senior United States District Judge C. Clyde Atkins, and another before United States District Judge William Hoeveler.

APPENDIX 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 85-3230-Civ-Atkins

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,
Appellants,

vs.

THE BANK OF NEW YORK,
Appellee.

MEMORANDUM OPINION

Appellants, Olympia & York Florida Equity Corp. ("O&Y") and O&Y as general partner and on behalf of Miami Center Joint Venture ("MCJV"), seek reversal of the Confirmation Order approving the Bank of New York's modified plan which subordinates appellants' claims to the payment of all other unaffiliated creditors. After reviewing the confirmation order and the record, I find that the bankruptcy court failed to provide the findings of fact necessary to support its conclusions. Without this information, I cannot adequately review and decide the issues on appeal. Thus, I must remand the case for further determination not inconsistent with this order.

Statement of the Case

The debtors, who are not parties to this appeal, initiated the underlying bankruptcy proceedings under Chapter 11 on August 22, 1984. The appellants, Olympia & York Florida Equity Corp. ("O&Y") and O&Y as general partner and on behalf of Miami Center Joint Venture ("MCJV"), had transactions with two of the debtors—Mr. Theodore B. Gould ("Gould") and the Miami Center Limited Partnership ("MCLP").

O&Y/MCJV's claims are against MCLP for which Gould and Miami Center Corporation ("MCC") are also obligated as the general partners of MCLP. Appellants claim is founded upon the FF&E lease agreements (Leases "A" and "B") in which MCJV purchased the furniture, fixtures, and equipment necessary for the operation of MCLP's hotel with funds advanced to MCJV by O&Y. In turn, MCJV leased the FF&E MCLP under the terms and conditions of the lease agreements.[1]

Appellant O&Y's claims are against Gould. These claims relate to Gould's obligations to O&Y as general partner in the MCJV joint venture partnership. Currently, MCJV owes O&Y in excess of 60 million dollars. Since Gould is a general partner, he is a guarantor of MCJV's debt to O&Y.

The Bank of New York ("Bank"), appellee, was the largest creditor of the debtors holdings claims in excess of 240 million dollars. The Bank formulated a single substantively consolidated plan which, as amended, consists of the following principle features.

(a) The Bank acquired the Miami Center project, *including the FF&E*, for its MAI-appraised fair market value of $255,600,000. That purchase price included (1)

---

[1] These lease agreements were found to be "true leases" by the bankruptcy court in its June 24, 1985 Memorandum Decision which was recently affirmed by this Court.

a credit for outstanding principal and interest with interest computed at the lower, "good standing" rate and (2) cash for the balance after giving effect to customary prorations and closing expenses.

(b) The net cash proceeds of the sale, together with the Bank's cash collateral of approximately $30,000,000 and the debtor's other remaining assets, were turned over to a "Liquidating Trustee," for the payment of all allowed claims.

(c) The Bank agreed to provide $14,417,679 for payment by the Liquidating Trustee to O&Y and/or MCJV, in the event that they prevail in amount and classification of their FF&E claims. (This agreement is now backed by a 15 million dollar Corporate surety bond.) This provision was required because the appellants objected to the subordination of their claims to class 7 which is below the claims of general and unsecured creditors.

Pursuant to the bankruptcy court's orders, the confirmation hearing for the Bank's Consolidated Plan and the debtors' Plans [2] was scheduled for April 29, 1985. However, because of the number of objections filed by various creditors, the court deferred holding a confirmation hearing on the plans until the proponents assessed and certified the creditors votes for the various plans, and the clerk's office certified the vote. No confirmation hearing was held on objections to the Bank's plan. Similarly, no hearing was held on the issues of subordination or classification of appellant's claims and interest, and no opinion was rendered regarding the subordinate classification of O&Y/MCJV's lease claims in spite of the adjudication of their status as owners/lessors of the FF&E. Finally, no hearing was held regarding debtors' and OBY [sic]/MCJV's objection that the Bank's plan was not fair and equitable.

---

[2] The debtor's plans were rejected by the creditors and by the bankruptcy court.

The Bank and the Unsecured Creditors Committee of the debtors negotiated a series of four stipulations. These stipulations were designed to satisfy the creditors and had the effect of amending the plan. The bankruptcy court approved the stipulations in its Confirmation Order without holding a hearing or ordering separate disclosure statements.

The Bank filed a Second Amendment to its plan which attempted to alleviate problems with the subordination of the MCJV lease claim by agreeing to pay the claim if subordination was found to be improper. O&Y/MCJV objected to the terms of the amendment. Nevertheless, the court approved it without holding a hearing or requiring a new disclosure statement.

Judge Britton entered the Confirmation Order on August 8, 1985. In it he stated:

> I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129 (b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

However, the court never articulated the basis for subordinating appellants' claims to the payment of all other unaffiliated creditors. The court did state, "[t]he circumstances do not require and time simply does not permit a review and discussion of all these issues in this order."

The Scope of Review and Necessity of Adequate Findings of Fact and Conclusions of Law

It is well settled that a district court must accord substantial deference to the bankruptcy court's findings of fact, reversing these only when they are "clearly erroneous." In Re *Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. *In Re Multiponics*, 622 F.2d 709, 712 (5th Cir. 1980). Yet, case law suggests that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. *See Watson v. Thompson*, 456 F. Supp. 432, 436 (S.D. Ga. 1978). Furthermore, the district court may make its own findings of fact, provided that there is no dispute as to the underlying facts. *See, e.g., In Re Neis*, 723 F.2d 584, 589 (7th Cir. 1983).

In a related matter, Judge Aronovitz discussed the importance of the trial court's findings of fact and conclusions of law.

> The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceedings below and the basis for the trial court's ruling, but it ensures that trial courts engage in a carefully reasoned analysis of each case. The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed. R. Bankr. P.* 7052, which requires the bankruptcy court to enter findings of fact and conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation

> at issue here were *adversary* proceedings as that term is defined in *Fed. R. Bankr. P.* 7001. These hearings below were "contested" matters as hereinafter defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed. R. Civ. P.* 52(a) are nonetheless applicable to the instant appeal.
>
> *Fed. R. Bankr. P.* 9014 extends the application of Rule 7052 to "contested matters." The appellants' objection to the final order of confirmation is explicitly made subject to Rule 9014 by *Fed. R. Bankr. P.* 3020(b). Thus, the Bankruptcy Judge should have made and entered clear and concise findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review.

Holywell Corp. v. Bank of New York, No. 85-3225 (S.D. Fla. Dec. 30, 1985) (order of remand) (footnotes omitted) (citations omitted).

Judge Aronovitz proceeded to examine the issues raised on appeal. Many of the issues he addressed are similar to those presented here. For example, both appeals involve the following:

(a) the doctrine of equitable subordination;

(b) the need for a valuation hearing;

(c) the unfair discrimination of similarly situated creditors under the plan or reorganization; and

(d) whether the bankruptcy court denied the parties due process by refusing their requests for hearings and disclosure of amendments to the plan.

He stated, "this Court has been left with the impeded, if not impossible, task of trying to apply a 'clearly erroneous' standard of review to findings of fact that are either non-existent or too vague to support adequate review." *Id.* at 8. Concerning the confirmation order, Judge Aronovitz noted:

> In the bankruptcy court s order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it does, significant rights and interests of creditors and debtors alike. . . .
>
> In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these orders was required.
>
> • • • •
>
> It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court.

Id. at 9-11.

In the present appeal, I find myself in agreement with Judge Aronovitz. In fact, with respect to the lease claims, the appellant's position is particularly compelling. The bankruptcy court found that they were "true lease" holders. Moreover, the record indicates that the Bank filed the relevant UCC-1 forms reflecting and recording certain priority rights. Further, the Bank's counsel con-

ceded the extreme importance of the subordinate classification of the lease claims.

> Treatment of the FF&E/lease claims and the classification of the in Class 7 and the decision that those claims are insider claims and should go behind the payments to the general unsecured creditors, the non-insider creditors, I would say that is the lynch pin of the plan.

[Court paper #800 at p. 24].

In short, in view of the importance of the issues on appeal and the conflicting evidence contained within the record, a more detailed discussion of the law and facts is required for an adequate review.

Conclusion

Judge Britton faced an extremely difficult task in handling this bankruptcy proceeding. The bankruptcy court dedicated a year to this matter. He considered over 1,000 pleadings and reams of evidence for the adversary proceedings. He had to consider the interests of over 400 parties. Most significantly the court was aware of the importance of resolving the matter quickly. Judge Britton knew that substantial interest was accruing on the $200 million construction loan which jeopardized the collectability of the claims of all creditors. While I believe that Judge Britton probably has a sound basis for his conclusion, it is regrettable that he did not convey this information in his confirmation order.

Therefore, it is

ORDERED AND ADJUDGED that this cause is *remanded* to the United States Bankruptcy Court for the Southern District of Florida, to hold further adversarial hearings and to enter such findings of fact and conclusions of law as are necessary to provide this court with an adequate basis to resolve this appeal. This should be

accomplished within sixty (60) days from the file stamp date of this order.

DONE AND ORDERED at Miami, Florida, this 30th day of June, 1986.

/s/ Clyde Atkins
United States District Judge

cc: All counsel & parties of record
Honorable Thomas Britton

APPENDIX 9

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORP., *et al.*,
Debtors.

ORDER DIRECTING CLOSING OF CHAPTER 11 CASE

The creditor's chapter 11 plan was confirmed on August 8, 1985.

Transfer of all or substantially all of the property proposed by the plan to be transferred, assumption by the debtors or the successor to the debtors under the plan of the business or of the management of all or substantially all of the property dealt with by the plan, and commencement of distribution under the plan constitute substantial consummation of the plan under 11 U.S.C. § 1101.

The disbursing agent, liquidating trustee Fred Stanton Smith, is directed to submit an order for payment of dividends to provide for all payments to be made on the effective date of the plan, file a deposit and disbursement statement and submit checks and a bank statement covering the initial disbursements called for in the plan. When all checks for the initial disbursement have cleared, the liquidating trustee shall file a final report and application for final decree.

The court shall not retain jurisdiction beyond substantial consummation and granting of the final decree in accordance with these directions.

DONE and ORDERED in Miami, Florida this 28th day of April, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Chief Bankruptcy Judge

Copies to:

Disbursing Agent and Liquidating Trustee for debtors
Fred Stanton Smith
c/o Irving M. Wolff, Esquire
HOLLAND & KNIGHT
1200 Brickell Avenue
P.O. Box 015441
Miami, FL 33101

Attorney for Debtors
Fred H. Kent, Jr., Esquire
KENT, WATTS & DURDEN
850 Edward Ball Building
Jacksonville, FL 32201

Vance E. Salter, Esquire
STEEL, HECTOR & DAVIS
4000 Southeast Financial Center
Miami, FL 33131-2398

S. Harvey Zeigler, Esquire
KIRKPATRICK & LOCKHART
1428 Brickell Avenue
Miami, FL 33131

APPENDIX 10

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER DIRECTING STATUS CONFERENCE AND SETTING HEARINGS

The liquidating plan presented by the Bank was confirmed over a year-and-a-half ago. Trustee's counsel has been directed repeatedly to bring this case to substantial consummation of the plan in order that the case may be closed and administrative expense terminated. Last fall, the trustee's counsel anticipated substantial consummation by the first of the year but appears no closer to that objective today.

1. Accordingly, a status conference will be held Monday, March 30, 1987 at 9:30 a.m. in Courtroom 1406 at 51 SW 1st Avenue, Miami, Florida at which time the trustee's counsel is directed to submit a schedule of matters that must be concluded for substantial consummation of the plan and closing of the case, specifying in each instance the dollar impact of the unresolved issue and the estimated date of resolution, and describing the steps taken by him or other parties to resolve the issue since October 1, 1986. Counsel is also directed to present an accounting reflecting the receipts and disbursements to date, the present disposition of surplus funds and the current interest being earned on those funds.

It is my understanding that the trustee must rely entirely on counsel and other parties to conclude this case, therefore, the trustee's attendance at the status conference is unnecessary.

2. At the foregoing hearing, notice is given that the court will consider the scheduling of a hearing to resolve all ad valorem tax litigation presently pending between the estate and Dade County. Although the automatic stay was modified to permit the parties to resolve these issues in the state court several years ago, I am informed that no dispute has yet been tried and none is presently scheduled for trial and that the trustee has elected, without this court's knowledge or approval, to burden the District Court with consideration of all these disputes.

3. A hearing will be held on Thursday, April 16, 1987 at 9:30 a.m. in Courtroom 1406 at 51 SW 1st Avenue, Miami, Florida to fix the amount of the MCJV Class 7 claim.

DONE and ORDERED in Miami, Florida this 20th day of March, 1987.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Chief Bankruptcy Judge

Copies to:

Attorney for Debtors
Fred H. Kent, Jr., Esquire
CARLTON, FIELDS, et al.
1400 Florida National Bank Bldg.
225 Water Street
Jacksonville, FL 32202-4486

APPENDIX 11

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Case No. 84-01591-BKC-TCB
Case No. 84-01592-BKC-TCB
Case No. 84-01593-BKC-TCB
Case No. 84-01594-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,
Debtors,

ORDER ON REMAND

The District Court Order of Remand dated December 30 reached this court on January 6 (C. P. No. 1145). It requires that one or more hearings be held, proposed findings and conclusions be entertained, and that this court not later than January 29:

> "make and enter such findings of fact and conclusions of law as are necessary to provide the District Court with an adequate basis to decide the . . . appeal on the merits."

At a conference held January 14, the debtor requested and on January 18 the court held an evidentiary hearing to receive additional evidence on three issues: (a) the value of the Miami Center Project, (b) the value to the estate of a lawsuit pending before Judge Hoeveler, and (c) amount of the Bank's lien. The parties also re-

quested leave to submit their proposed findings and conclusions by January 23. The parties agreed that no other hearings were necessary.

Although counsel for MCJV and O&Y attended both hearings, neither they nor any party other than the debtors and the Bank participated.

On January 23, both the debtors (C. P. No. 1175) and the Bank (C. P. No. 1176) submitted comprehensive and detailed proposed findings and conclusions, respectively 43 and 52 pages in length.[1] In addition, the debtors filed on January 28 the debtors' 22-page response to the Bank's proposed findings and conclusions.

I presume counsel understand what will best assist Judge Aronovitz. Recognizing the weight accorded to adopted findings, *Anderson v. Bessemer City*, 470 U.S. ——, 84 L.Ed.2d 518, 527 (1985), I have used the time available to me to review carefully the proposed findings and conclusions and the debtors' Response together with the entire record, instead of attempting to reword and retype forty to fifty pages of similar detail. For the most part the facts flow from uncontroverted matters of record. The parties differ in the emphasis they give and the inferences they draw from the undisputed events.

I reject the proposals of the debtors as reflecting in essential respects the contentions I considered and rejected previously. I adopt the Bank's proposed findings of fact and conclusions of law, copies of which are attached and incorporated in this Order. They accurately represent my own considered conclusions as to both the facts and legal principles implicit in the Confirmation Order of August 8, 1985 (C. P. No. 906) and the earlier

---

[1] Official Form 31, prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009 as the form for a chapter 11 Order Confirming Plan, is a page and a half and contains only the eight statutory requirements of 11 U.S.C. § 1129(a) rephrased as mixed

* * * *

Consolidation Order (C. P. No. 840). The earlier order followed one session of the extended confirmation hearing and resolved one bitterly contested element of the confirmation issues. It was not possible, in this case, to hear all the issues and parties during one uninterrupted session.

In a matter of this magnitude, fought as hard as this one has been, it is easy to lose sight of the forest while concentrating on the trees. Neither this review, the additional evidence tendered, nor the subsequent events have caused me to recede from the decisions I reached after spending a year with all the parties and the issues they presented, which I attempted to put into perspective in the Confirmation Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

[Proposed by the Bank of New York].

Findings of Fact

A. *Parties*

1. The debtors are Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

2. The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Pavillon Hotel, retail space between them known as the "Podium",

and an adjoining parking garage (collectively, the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

3. Miami Center Joint Venture ("MCJV") is a Florida general partnership formed by debtor Gould and Olympia & York Florida Equity Corp. ("O&Y"), a Florida corporation established by a large Canadian real estate development company. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the Phase I Project. Gould and O&Y originally planned to construct Phases II and III of Miami Center on those lots, but disputes and litigation between the two partners prevented any such construction.

4. Holywell Leasing Company ("HLC") and Holywell Telecommunications Company ("HTC") are two of numerous non-debtor subsidiaries wholly owned by debtor Holywell (wholly owned, in turn, by Gould). Gould was president of each at all material times.

5. Over 400 other creditors have an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by this Court, and have been active, for the Holywell, MCLP, and MCC estates.

B. *Jurisdiction*

6. This Court has jurisdiction over these reorganization proceedings and over the parties pursuant to 28 U.S.C. § 157, the standing order of reference in this District, and the Order of Remand.

C. *The Debtors' Plans*

7. The debtors filed a separate, amended disclosure statement and plan for each estate; however, all were

nearly identical in form and substance [C.P. No. 466-470].

8. The debtors' plans were predicated upon:

(a) the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for $260 million;

(b) the payment of undisputed claims from approximately $32 million realized by Holywell, a wholly-owned subsidiary, and Gould in January, 1985 from the sale of other real estate in the Washington, D.C. area (by Order entered December 31, 1984, C.P. No. 303, such funds were determined to be cash collateral under 11 U.S.C. § 363, subject to the Bank's first lien);

(c) the pursuit in the District Court of a lawsuit against the Bank and its participating lenders (*Miami Center Limited Partnership, et al. v. The Bank of New York, et al.*, Case No. 85-0228-Civ-Hoeveler; the "District Court Action") for alleged fraud, usury, breach of contract, and civil claims under the federal RICO act; and

(d) equitable subordination of the Bank's construction loan and mortgages under 11 U.S.C. § 510(c).

D. *Objections to the Debtors' Plans*

9. Objections to the debtors' amended plans were filed by:

(a) O&Y [C.P. No. 533], upon the grounds that:

(1) the debtors' plans were based on a "wholly speculative agreement" with Hadid, "replete with holes and contingencies";

(2) O&Y and MCJV, "would be subjected to continuing delays, mounting costs and interest charges", and:

> The past record of the Debtors, and notably of Mr. Gould as the controlling and dominating person, is replete with evidence of unfounded representations,

> commitments and undertakings breached, and a myriad of obligations, assurances and agreements unfulfilled and repudiated. The record in these very proceedings, reflect the repeated experiences of partners and creditors with such abandoned commitments and undertakings.
>
> [*Id.*, Paragraph 3];

(3) "Gould, as proponent of the Debtors' consolidated plans, in light of his loss of credit and credibility in the real estate and financial markets, is perhaps the least likely prospect to achieve a prompt sale and disposition of the properities concerned and a discharge of the claims of creditors." [*Id.*, Paragraph 5];

(4) the debtors' plans classified the O&Y claims "in a separate and subordinate class", below those of other unsecured creditors;

(5) the debtors' plans lacked "sufficient funds . . . to provide for the repayment of all of [O&Y's] claims";

(6) the debtors' plans failed to provide for the discharge of the claims of O&Y under two agreements covering certain furniture, fixtures and equipment (the "FF&E"); and

(7) the debtors' plans failed to provide for the payment of debtor Holywell's liability, "to MCJV and [O&Y] of an amount of approximately $1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation" [Id., Paragraphs 13 and 14].

(b) the Bank [C.P. No. 535], upon the grounds that:

(1) the debtors' plans were misleading, and were based upon contingencies unlikely to materialize and requiring years of litigation to resolve;

(2) the debtors' plans failed to meet the "best interest of creditors" (Section 1129(a)(7)), feasibility (Section 1129(a)(11)), and "cram down" (Section 1129(b)(1)) requirements under the Code; and

(3) the debtors' "equitable subordination proposal in respect to the Bank's liens was moot in light of this Court's March 20, 1985 decision [C.P. No. 20 in Adv. Pro. No. 85-0160-BKC-TCB-A] holding that two releases executed by the debtors in favor of the Bank and its participating lenders) barred the debtors' claims of wrongdoing.

(c) the MCC and MCLP Creditors' Committees [C.P. No. 567], upon the grounds that:

(1) the debtors' plans were not feasible, because the Hadid contract was "not a true and valid offer";

(2) the matter of equitable subordination of the Bank's claim had been adjudicated against the debtors;

(3) the debtors' plans would eliminate the estates' equity because of the accrual of interest on the Bank's mortgages during the litigation and the Hadid contract delays;

(4) the debtors' plans unfairly discriminated against creditors and were not fair and equitable;

(5) the debtors failed to comply with 11 U.S.C. § 1129 (a)(5)(A)(i); and

(6) the debtors made solicitations of creditors through improper "telephone calls and a mailgram, which did not truthfully represent the facts", attempting in bad faith to obtain acceptances, in contravention of 11 U.S.C. § 1126(e).

(d) Julian J. Studley, Inc. [C.P. No. 526], an unsecured creditor, because of the improper classification of its claims and failure to comply with 11. U.S.C. § 1123 (a)(4).

(e) the Holywell Creditors' Committee [C.P. No. 516], upon the following grounds:

(1) the "illusory" nature of the debtors' plans because, "they do not present a binding contract with a purchaser,

but represent merely an option to a real estate broker which can be extended through September, 1985, under the Contract", and the "down payment" was merely a promissory note; and

(2) the debtors' plans would entail substantial delays because of (i) the "study period" and extensions under the Hadid contract and (ii) the litigation involved in the attempt to subordinate the Bank's claims.

E. *The Bank's Plan*

10. The Bank filed an amended, consolidated disclosure statement and plan [C.P. No. 478] which was further amended [C.P. No. 854] during the course of the confirmation proceedings. The Bank also entered into certain stipulations with the Creditors' Committees [C.P. No. 564, 614, 709c, and 876a]. Neither the stipulations nor the second amendment to the Bank's plan adversely affected any party other than the Bank.

11. The central features of the Bank's amended, consolidated plan are:

(a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E, for its MAI-appraised value of $255.6 million, comprised of (i) satisfaction of the Bank"s judgment lien, computing interest at the contract or "good standing" rate rather than the higher default rate, and (ii) the balance, after closing adjustments and prorations, in new cash;

(b) the establishment of the "Miami Center Liquidating Trust", consisting of all other assets of the debtors, for the payment of all other claims by a court-appointed Liquidating Trustee;

(c) the release by the Bank of its cash collateral (approximately $30 million), for addition to the new cash generated by the sale of the Miami Center Project (approximately $13.6 million), with the combined funds to

be used by the Liquidating Trustee to pay the claims of all other creditors;

(d) a further financing commitment of approximately $14.4 million by the Bank for payment of the claim of MCJV for the FF&E, (i) if and when such claim is allowed over the Bank's pending objections, (ii) to the extent other assets of the Liquidating Trust prove insufficient to pay the claim, and (iii) if it is ultimately determined that MCJV has been damaged by its (allegedly) improper classification under the Bank's plan;

(e) dismissal of the District Court Action by the Liquidating Trustee; and

(f) the consolidation of all five estates in a manner such that the unaffiliated creditors of Holywell are paid first, the unaffiliated creditors of the other debtors are paid next, and the many inter-debtor and related party claims are paid thereafter.

F. *Objections to the Bank's plan*

12. Objections to the Bank's Plan were filed by:

(a) the Holywell Creditors' Committee [C.P. No. 515], but these objections were subsequently withdrawn by stipulation [C.P. No. 614, paragraph 6];

(b) O&Y [C.P. No. 532, 817a, 871], upon the grounds that:

(1) the Bank's plan assumes title to the MCJV FF&E without adequate and priority payment of sums allegedly due under the FF&E agreements; and

(2) the Bank's plan, "fails to provide for payment of Gould's and Holywell Corporation's obligations to O&Y through MCJV of an amount of approximately $1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation . . . ".

(c) Shutts & Bowen, a creditor and law firm representing the debtors [C.P. No. 537a], upon the grounds that:

(1) the Bank's plan is "unfairly discriminatory and is not fair and equitable" to impaired classes;

(2) the Bank's valuation of assets and claims is erroneous;

(3) the Bank's plan assumes liabilities of MCJV;

(4) the Liquidating Trust is violative of 11 U.S.C. § 1129(5)(A)(i); and

(5) the plan's priority scheme does not comply with 11 U.S.C. § 1129.

(d) MCJV [C.P. No. 808], though comprised of Gould and O&Y, in separate objections alleging that the plan fails to provide proper payment and priority for the MCJV FF&E claims.

(e) the debtors [C.P. No. 534, 545, 580, 849, and 888a], upon the grounds that:

(1) the Bank's plan fails to pay in full for the FF&E;

(2) the Bank's plan deprives mechanics' lien claimants of their security;

(3) the Bank's plan and disclosure statement are misleading;

(4) substantive consolidation would only result in "unjust enrichment" to the Bank and other creditors;

(5) the Bank's plan would cause the limited partners to lose their investment and to become liable for additional taxes;

(6) the District Court Action would be "summarily" dismissed, "without due process of law"; and

(7) the appointment of a Liquidating Trustee violates 11 U.S.C. § 1104(a).

G. *Voting by the Creditors*

13. After the debtors' and the Bank's disclosure statements were approved, and pursuant to this Court's order

[C.P. No. 405], separate ballots for the debtors' plans and for the Bank's plan were transmitted to all creditors for return by April 29, 1985. On that date, the Court held an initial confirmation hearing and, with the assistance of counsel, established a procedure for the tabulation of the ballots and for certification by the plan proponents of the availability of all funds necessary for consummation should a plan be confirmed [C.P. No. 611, 612, 619].

14. The requisite certificates respecting the voting and the funding were filed by each side on May 13, 1985, as directed [C.P. No. 658-664], and were reviewed by the Court.

15. The voting indicated overwhelming support for the Bank's plan among the creditors, and rejection of the debtors' plans. Creditors in Classes 1 through 6 approved the Bank's plan by well over the minimum margins required (one-half in number and two-thirds in dollar amount, per 11 U.S.C. § 1126(c)). However, O&Y and MCJV (Class 7 under the Bank's plan), certain wholly-owned subsidiaries of Holywell controlled by Gould (Class 8), and the debtors themselves (Class 9), voted against the Bank's plan. Accordingly, the Court was required to determine whether the plan met the requirements of 11 U.S.C. § 1129(b).

H. *Establishment of the Bank's Lien*

16. In order to establish the amount, validity, and priority of its lien over the debtors' property, the Bank filed an adversary proceeding against the debtors (Adv. Pro.No. 85-0160-BKC-TCB-A).

17. The debtors sought a stay of the scheduled trial of the lien proceeding (a) initially in the Bankruptcy Court [C.P. No. 3A in Adv.Pro. 85-0160], and (b) then in the District Court Action. Both Courts refused to enter such a stay, and the trial went forward as scheduled.

18. That proceeding culminated in the entry by this Court of:

(a) a final judgment in favor of the Bank for principal and interest of $234,342,742.93, plus interest of over $75,000 per day from March 14, 1985, forward [C.P. No. 21 in Adv.Pro. 85-0160]; and

(b) a memorandum decision upholding the two releases executed by the debtors in favor of the Bank (and its participating lenders), and determining that those releases barred the fraud, breach of contract, usury, and RICO theories raised by the debtors as purported defenses in this Court and as claims in the District Court Action [C.P. No. 20 in Adv.Pro. 85-0160].

At the remand hearing on January 18, 1986, the debtors presented evidence which purported to show a discrepancy in the amount of the Bank's lien. However, since that amount has been embodied in a final judgment [C.P. No. 21 in Adv. Pro. 85-0160] that is now on appeal before the District Court (*Gould et al. v. The Bank of New York, Case* No. 85-2263-Civ-NCR), the Court wili not revisit that issue. The Court has also been directed to the debtors' brief in that appeal which states, at page 23, that the debtors, "do not contest that the principal amount advanced by The Bank of New York is $196,711,481.58", exactly the amount set forth in the final judgment [transcript of hearing of January 18, 1986, page 11].

I. *The FF&E Leases*

19. Next, as part of the continuing confirmation process, the parties advised the Court that characterization of two agreements, relating to the FF&E and between MCJV and MCLP (debtor Gould was managing general partner of each), as "true leases" or as "financing agreements" could be dispositive of the FF&E claims asserted by O&Y and MCJV. The Bank filed [Adv.Pro.No. 85-0566-BKC-TCB-A] an adversary proceeding against the affected parties seeking a determination of the nature (secured

or unsecured), extent, and value of such claims. The Bank also filed an objection to the FF&E claim filed by O&Y and MCJV [C.P. No. 811], which remains pending.

20. After an evidentiary hearing, the Court entered an extensive memorandum opinion [C.P. No. 26 in Adv. Pro. 85-0566] holding that the two agreements were "true leases" (and, therefore, that MCJV owned the FF&E subject to debtor MCLP's option rights under the leases). The Court was not asked to, and did not, determine in that proceeding the priority of MCJV's claim or the proper amount of that claim assuming exercise of MCLP's option to acquire the FF&E (as provided by the Bank's plan).

J. *Substantive Consolidation*

21. Thereafter, the parties furthered the confirmation process by noticing an evidentiary hearing upon the debtors' objections to the substantive consolidation feature of the Bank's plan. Both sides presented evidence and argument [C.P. No. 844] on the issue.

22. The Court determined, based upon facts and authorities detailed below (Paragraphs 29-41 and 58-67), that substantive consolidation is in the best interest of creditors, is not prejudicial to the debtors, and is appropriate on the record before the Court [Consolidation Order, C.P. No. 840]. Under the plan, the creditors have received or will receive more than they would in liquidation. 11 U.S.C. § 1129(a)(7).

K. *Further Hearings*

23. During the confirmation process (April 29 through August 8, 1985), the Court held numerous other hearings and invited counsel to submit such memoranda and request such hearings as they might deem appropriate or necessary to supplement the already-voluminous record before the Court. During that time, no further evidentiary hearings were requested.

24. However, pursuant to the Order of Remand and the written request of counsel for the debtors, a further evidentiary hearing was conducted on January 18, 1986, for the submission of evidence regarding:

(a) the value of the Miami Center Project;

(b) the value or "cost/benefit" of the District Court Action; and

(c) the calculation of the Bank's lien.

L. *Findings As to the Debtors' Plans*

25. At the instance of the Bank, the deposition of the President of Hadid Investment Group, Inc. (the proposed purchaser of the Miami Center Project for $260 million under the terms of the debtors' plans), Mohammed A. Hadid, was taken on April 19, 1985 [C.P. No. 649]. Hadid's testimony and the deposition exhibits demonstrate, and the Court finds, that:

(a) the Hadid contract had no fixed closing date, and was little more than an open-ended option;

(b) Hadid was still searching for a principal to finance or acquire the Project under the contract, and did not have the wherewithal independently to close the purchase;

(c) Hadid and any such principal would not deal with the Project until the "cloud of bankruptcy" was removed; and

(d) the "down payment" was a mere promissory note of dubious enforceability.

26. As is evident from the results of the voting (see Paragraphs 14 and 15, *supra*), numerous classes of creditors voted against the debtors' plans.

27. The "equitable subordination" of the Bank's judgment, as proposed by the debtors, would not have been permitted because the debtors had specifically released any

and all such claims against the Bank and its participating lenders [C.P. No. 20 in Adv.Pro. 85-0160].

28. The debtors' numerous disputes and litigation on nearly every front—with the IRS, the City of Miami, the *ad valorem* tax authorities, the general contractor, the debtors' former lawyers, the former hotel operator (Trusthouse Forte), O&Y, the leasing agent (Julian J. Studley, Inc.), prospective tenants, and the Bank—would have continued or even increased under the debtors' plans, such that the funds of the estates otherwise available for the payment of claims to creditors would have been substantially eroded by legal fees and other costs of litigation. All such litigation is detailed in the debtors' amended schedules [C.P. No. 275-278] and disclosure statements [C.P. No. 377-381]. It is likely that consummation of the debtors' plans would have been followed by liquidation or by a need to further reorganize. 11 U.S.C. § 1129(a)(11).

M. *Findings on Substantive Consolidation As Proposed by the Bank's Plan.*

29. All of the Creditors' Committees supported substantive consolidation. No creditor (except for those controlled by Gould) objected to substantive consolidation.

30. Gould's testimony at deposition, to which the Court was directed at the hearing on substantive consolidation [C.P. No. 385h], was:

> Q: Is it fair for us to conclude that Holywell, the parent company, is the ultimate beneficiary of any and all profits that these companies make?
>
> A: [Mr. Gould]: Yes, it is. [Page 31].
>
> * * * *
>
> Q: Has it been customary for these interrelated companies to move money back and forth?
>
> A: Yes. [Page 202].

* * * *

Q: Did either of these two corporations operate at a profit?

A: All of them did.

Q: All of that money was dividended up to Holywell?

A: Yes.

Q: Then you, as the sole stockholder in Holywell, got a dividend from Holywell?

A: No. All the funds during the past four years have been loaned to this project.

Q: Holywell—

A: All of the funds that Holywell has earned during the past four years have been loaned to the Miami Center Limited Partnership. [Page 55].

Moreover, the debtors specifically asked the Court to approve (and the Court did approve) as undisputed liabilities of the debtors, payments to terminated employees of Holywell's wholly-owned subsidiaries: Parkwell, Inc.; Parkwell of Florida; Holywell Construction Co.; Holywell Telecommunications Co.; Florida Viking Properties; Orion Engineering Services; Whitehall Building Services; Whitehall Security Corp.; and Holywell Hotels, Inc. [C.P. No. 609, Exhibit "B"]. All such employees performed services for the Miami Center Project owned by debtors MCLP and Chopin.

31. The debtors' schedules [C.P. No. 275-278] show, and the debtors have never disputed that:

(a) Gould owns 100% of debtor Holywell;

(b) Gould is jointly and severally liable for all of the debts of debtor MCLP and of debtor Chopin because he is a general partner of each (Sections 620.62 and 620.625, Florida Statutes);

(c) Holywell owns 100% of debtor MCC and of Holywell's numerous other subsidiaries; and

(d) MCC is also jointly and severally liable for all debts of MCLP and Chopin, because MCC is a general partner of each.

32. The debtors' outside accountant testified, and the Court thus finds, that Holywell's financial statements were consolidated with those of debtor MCC [C.P. No. 844, pages 37-38].

33. The debtors cross-guaranteed each other's liabilities to the Bank and to various other creditors. Many creditors filed claims against the wrong debtor or debtors as a result. For example:

(a) Holywell Construction Company, a wholly-owned subsidiary of debtor Holywell, was "an agent of [debtor] Miami Center Limited Partnership" [C.P. No. 788, page 37; see also page 100].

(b) Holywell Real Estate Corporation, another of the many wholly-owned subsidiaries of debtor Holywell, entered into a contract for work at Miami Center that was always to be paid by debtor MCLP [Id. at page 45; the Court held debtor Holywell liable].

(c) The State of Florida, Department of Labor, believed its claims were against "Holywell Hotels, Inc., trading as Pavillon Hotel", rather than against debtor Holywell [Id. at page 99].

(d) Debtor MCLP acknowledged indebtedness for purchases made by Whitehall Security Corporation, another wholly-owned subsidiary of debtor Holywell [Id. at page 104].

(e) Debtor Holywell furnished credit information in support of credit extended for purchases by debtor MCLP, and was invoiced for those purchases [Id. at 123-29].

(f) A Miami law firm invoiced debtor Holywell for services allegedly obtained for debtor MCLP, apparently by Holywell Construction Company [Id. at 147-49].

34. The creditors filed overlapping claims because of their confusion. The debtors objected to over 300 claims on the grounds that the claims were filed against the wrong debtors [C.P. No. 577-579, 584-86, 588, 589].

35. The schedules claim the following inter-company indebtedness, among others, between various debtors and their wholly-owned subsidiaries:

(a) MCLP owes Holywell $4,080,395.21.

(b) MCLP owes Holywell's wholly-owned subsidiary "Charleston Center Corp." $2,067.801.71.

(c) MCLP owes debtor Chopin $11,528,389.33.

(d) MCLP owes Holywell's wholly-owned subsidiary "Holywell Construction Co." $500,832.12.

(e) MCLP owes Holywell's wholly-owned subsidiary "Holywell Hotels, Inc." $1,923,862.81.

(f) MCLP owes Holywell's wholly-owned subsidiary "Holywell Management Co." $222,004.55.

(g) MCLP owes Holywell's wholly-owned subsidiary HTC $64,489.59.

(h) MCLP owes Holywell's wholly-owned subsidiary "Orion of Washington" $499,333.00.

(i) MCLP owes Holywell's wholly-owned subsidiary "Orion Engineering Services" $275,704.74.

(j) MCLP owes Holywell's wholly-owned subsidiary "Parkwell, Inc." $114,249.21.

(k) MCLP owes Holywell's wholly-owned subsidiary "PBA Architects, Inc." $856,709.17.

(l) MCLP owes Holywell's wholly-owned subsidiary "Pietro Belluschi, Inc." $300,833.

(m) MCLP owes Gould $2,215,539.09.

(n) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Building Services, Inc." $26,385.47.

(o) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Security Corp." $1,543,938.86.

(p) Gould owes Holywell $1,750,000 plus interest.

(q) Holywell is owed the following by its wholly-owned subsidiaries:

Charleston Center Corp.	$1,814,066.09
PBA, Inc.	1,201,578.97
TBG Institute	1,199.00
Parkwell of Florida	1,937.54
Whitehall Security Corp.	2,535.35
Whitehall Building Services, Inc.	7,617.15
Orion Engineering	3,359.28
Holywell Management	59,724.88
Racing Club	82,597.81
Holywell Hotels, Inc.	5,000.00
Holywell Trading	834.35
Holywell Real Estate	137,784.49
Holywell Telecommunications Co.	471,115.39
Holywell Insurance Company	10,541.46
Studley/Holywell Associates, Inc.	30,493.08

36. The foregoing intercompany indebtedness exceeds $31,800,000. Since Gould controlled both the purported obligor and the obligee with respect to each such liability, and since he admitted on deposition that he advanced all of the income from all of the debtors through Holywell to assist with MCLP's development of the Miami Center Project [See Paragraph 30, *supra*], such advances cannot be characterized at arms'-length or as founded upon adequate consideration.

37. Exhibit 4, Question 19b, in Holywell's Statement of Financial Affairs [C.P. No. 275] indicates that Gould paid himself (because he owned and controlled Holywell) $1,051,844.67 from debtor Holywell's cash during the 11-

month period before the bankruptcy, and that Holywell made a loan of $1,750,000 to Gould on October 14, 1983. During the hearing on this issue on July 18, 1985, Holywell's chief financial officer conceded [C.P. No. 844, page 57, lines 19-24] that the Holywell-Gould loans were not evidenced by a written note. Schedule B-2 to the Statement of Financial Affairs shows that Holywell owned 100% of 19 different subsidiaries (only one, MCC, is a debtor), and that 14 of those subsidiaries allegedly owed money (about $3.8 million) to Holywell.

38. MCLP's Statement of Financial Affairs [C.P. No. 276] also reflects numerous inter-debtor transactions and debts (most are summarized at Paragraph 35, *supra*). MCLP, though admittedly in default under its loans with the Bank at the time, paid Holywell over $1.2 million [*Id.*, Exhibit 13(a)] in the seven months preceding the bankruptcies.

39. MCC's schedules [C.P. No. 277, Schedule B-2] show that Holywell owed MCC $898,779, and that MCC (wholly owned by Holywell) owned a 47.88% partnership interest in MCLP and a 64% partnership interest in debtor Chopin. The schedules also confirm [Schedule A-2] that MCC is liable as a general partner for the debts of MCLP and of Chopin.

40. Gould's schedules [C.P. No. 278, Schedule A-1] show claims against him by the IRS of over $2.5 million because (a) Gould was an officer of debtor Holywell's wholly-owned subsidiaries Holywell Construction Company and Holywell Hotels, Inc., and (b) he failed to cause those entites to pay federal withholding taxes. The schedules also admit [Schedule A-2] Gould's liability as general partner for MCLP's debts (other than any nonrecourse mortgages) and for Chopin's debts. Finally, Gould listed ownership [Schedule B-2] of 17% of MCLP and 36% of Chopin.

41. Thus, debtor Gould owned all of debtor Holywell, which in turn owned all of debtor MCC. Gould therefore

owned, directly or indirectly through Holywell and MCC, general and limited partnership interests constituting 64.88% of MCLP and 100% of Chopin. The debtors have never disputed that Gould personally controlled all five of the co-debtors.

N. *Findings on Classification Under the Bank's Plan*

42. The objections relating to the classification structure of the Bank's plan came only from entities which Gould controlled (MCJV, of which he was "managing venturer" and general partner, and HTC and HLC, of which he was president—and which he owned through his 100% ownership of Holywell), or with whom he was a partner (O&Y and the minority limited partners of MCLP).

43. The claims of MCJV and O&Y were classified as "Class 7" under the Bank's plan, junior in priority of distribution to the claims of general unsecured creditors that were not affiliated with Gould (Class 6). The MCJV and O&Y claims are not substantially similar to the claims of those unaffiliated creditors, because;

(a) Any distribution to MCJV increases the value of debtor Gould's 50% equity in MCJV;

(b) MCJV has recourse to Gould's equity interest in MCJV's valuable real estate, while the unaffiliated unsecured creditors have no such recourse (the MAI appraisal filed by the debtors indicated that the four unimproved parcels owned by MCJV were worth $104 million [C.P. No. 149, Exhibit "C"; also of record at C.P. No. 822, Exhibit "A"], while the liabilities of MCJV have been represented to be approximately $60 million;

(c) the MCJV claim was asserted by a purported creditor (MCJV) controlled by a debtor (not the case for any Class 6 creditor); and

(d) similarly, O&Y stands to realize 50% of any distribution to MCJV, and has recourse against Gould's

50% equity in MCJV, for O&Y's claims against the debtors.

44. Similarly, the claims of HTC and HLC (each wholly owned by debtor Holywell and controlled by Gould), assigned to Class 8, are substantially dissimilar to the claims of the unaffiliated, Class 6 unsecured creditors. 100% of any payment to HTC or HLC directly benefits (and is readily available to) debtors Holywell and Gould. Payments to unaffiliated creditors, on the other hand, do not result in any other direct or indirect benefit to any debtor.

45. The limited partners of MCLP hold equity interests rather than claims, and were assigned to Class 9. Such interests are not substantially similar to the claims of any of the senior classes under the Bank's plan.

O. *Findings on Equitable Subordination*

46. The entities affiliated with Gould and objecting to classification junior to the claims of general unsecured creditors have consistently maintained that this Court lacked a sufficient factual basis to equitably subordinate such claims. The Order of Remand directed the Court to enter detailed findings on the issue. As the conclusions of law demonstrate (see Paragraphs 68-74, *infra*), the Court approved the junior classification accorded such claims by the Bank's plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. § 1122) that had no such affiliation with the debtors.

47. So that the record is clear, however, the factual prerequisites for equitable subordination of the MCJV, O&Y, HTC, and HLC claims are also established by the record. Gould engaged in inequitable conduct, including:

(a) The payment of enormous sums of money to himself (see Paragraph 37, *supra*), at a time when he was refusing to pay numerous unaffiliated creditors of all of the debtors;

(b) conflicts of interest resulting from his control of both lessor and lessee under the MCJV-MCLP FF&E agreements, the HTC-MCLP FF&E agreement, the HLC-MCLP FF&E agreement, and the Chopin-MCLP ground lease; and

(c) his failure to pay withholding taxes for Holywell Hotels, Inc. and Holywell Construction Company (see Paragraph 40, *supra*), with the result that his estate was charged for the $2.5 million in penalties under 26 U.S.C. § 6672, to the detriment of creditors.

48. Gould's misconduct injured his creditors and, but for the substantive consolidation of the five estates and junior classification of the related-party claims as provided by the Bank's plan, Gould's inter-company liabilities would have permitted Gould, and non-debtor entities controlled by him, to receive distributions from the "cash-rich" estates (the Gould and Holywell estates, if contingent liabilities are disregarded), while unaffiliated creditors of the cash-poor estates (principally MCLP) would have received dividends (if any) amounting to less than full payment of their claims. All such misconduct is imputed as a matter of law to the entities for which Gould acted (see Paragraph 62(a) in the Conclusions of Law which follow).

P. *Valuation of the Project*

49. Prior to confirmation, no party or attorney for a party requested a valuation hearing. The Court had before it the following evidence as to the value of the Miami Center Project:

(a) the debtors' appraisal [C.P. No. 392], setting the value of the Project at $260.5 million (land and buildings) plus $14.5 million (FF&E) as of October 1, 1984;

(b) the Hadid contract [Exhibit "A" to C.P. No. 378] of February 11, 1985, for a gross purchase price of $260 million, apparently exclusive of the FF&E;

(c) the liquidation values assigned to the property by the debtors in their disclosure statements: $210 million for the structures [Exhibit "E" to C.P. No. 378] and $23.4 million for the underlying land [Exhibit "E" to C.P. No. 380], or a total of $233.4 million without the FF&E; and

(d) the Bank's appraisal [C.P. No. 479, 796], setting the value of the Project including the FF&E at $255.6 million as of November 15, 1984.

50. Upon remand, the parties presented the testimony of their respective appraisers. Each appraiser adhered to his prior estimate of value [transcript of hearing of January 18, 1986 (not yet docketed), pages 62-108].

51. Upon the record before the Court prior to confirmation, the Court found that the Bank's proposed purchase price of $255.6 million, including the FF&E, was fair and equitable, and considerably in excess of the liquidation value of the Project as computed by the debtors. The Bank's offer was the only firm offer available, and had the added benefit of releasing over $30 million of the Bank's cash collateral for the payment of other creditors. In the Confirmation Order of August 8, 1985, this Court noted:

> The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

The absence of offers in excess of the Bank's proposal is significant. The Bank's purchase price and MAI appraisal ($255.6 million, including FF&E) are between

the debtors' liquidation estimate ($233.4 million, without FF&E) and the debtors' MAI appraisal ($260.5 million without FF&E, or $275 million with FF&E). The two appraisers agree that the income approach to value should be given the greatest weight. The debtors' appraisal computed a value of $267 million under that approach [C.P. No. 392, page 99], while the Bank's appraiser's comparable estimate was $255.6 million. The difference between the values, less than 5%, apparently occurred because the debtors used estimated taxes and assessments of $4 million per year, while the Bank's appraiser used the actual taxes and assessments imposed by Dade County and the City of Miami (approximately $5.2 million per year) [transcript of hearing of January 18, 1986 (not yet docketed), page 91].

52. The Court has not been presented with any new evidence upon remand that would alter the findings in the Confirmation Order. The evidence upon remand does, however, make it clear that the debtors are taking inconsistent positions for purposes of these proceedings on the one hand and Dade County property tax proceedings on the other. The County appraised the facilities at $183.7 million in 1984, while the debtors' "good faith estimate" of value for the Project was only $87 million [see Exhibit "A" to C.P. No. 491, "Debtors' Emergency Motion for Authorization to Pay Good Faith Deposit on 1984 Dade County, Florida Real Estate Taxes", also marked as Exhibit "D" at the hearing of January 18, 1985].

53. Based upon all of the foregoing, the Court finds that the $255.6 million purchase price offered by the Bank for the Project (including the FF&E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

Q. *District Court Action*

54. In the Confirmation Order, the Court noted the litigiousness of the parties:

> If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The District Court Action is an illustration of that point. In the memorandum decision respecting the releases signed by each of the debtors [C.P. No. 20 in Adv.Pro. 85-0160], this Court held that the releases barred both future and existing claims relating to the transactions between the debtors and the Bank. Notwithstanding the releases and this Court's ruling on the releases, however, the debtors continued to maintain the District Court Action.

55. It is not surprising that the Bank required dismissal of the District Court Action as a condition to close the purchase under its Plan. It would make little sense for the Bank to invest new money, discharge its judgment lien, and release millions of dollars of cash collateral, only to remain exposed to continuing litigation costs (probably unrecoverable from the debtors). In light of the releases, no significant value can be assigned to the District Court Action; to the contrary, the continuance of the suit is a significant detriment because of the first-priority attorneys' fees that would have to be incurred to do so.

56. This analysis was confirmed upon remand by the expert testimony of a seasoned, local trial lawyer (and former Florida Circuit Court Judge), presented by the

Bank upon remand [transcript of hearing of January 18, 1986 (not yet docketed), pages 34-39]. I find that the District Court Action has no significant value to the debtors.

R. *Consummation of the Bank's Plan*

57. The Court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the plan have been verified by the following, and propriety of the plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) all Class 1 administrative claims have been paid or reserved for;

(b) the Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the Class 2 creditor (the Bank) and the termination of interest (accruing at over $2 million per month) and negative cash flow from operations;

(c) the Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and

(f) there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liqui-

dating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

Conclusions of Law

S. *Substantive Consolidation*

58. Substantive consolidation, derived from this Court's general equitable powers under 11 U.S.C. § 105, is a case-by-case inquiry. 5 *Collier on Bankruptcy*, ¶ 1100.06 at 1100-33 (15th ed.). In substantive consolidation cases, "the relationship between entities with respect to which consolidation is sought is far more important than the nature of such entities". *Id.* Thus it is not significant that the debtors sought to be consolidated are an individual, two partnerships, and two corporations.

59. Certain objective criteria should be considered in evaluating whether substantive consolidation is warranted:

(a) The presence or absence of consolidated financial statements;

(b) The unity of interests and ownership between various corporate entities;

(c) The existence of parent and intercorporate guarantees on loans;

(d) The degree of difficulty in segregating and ascertaining individual assets and liabilities;

(e) The existence of transfers of assets without formal observance of corporate formalities;

(f) The commingling of assets and business function; and

(g) The profitability of consolidation at a single physical location.

In Re Donut Queen, Ltd., 41 B.R. 706, 709 (Bktcy., E.D.N.Y. 1984).

60. However, "there is no one set of elements which, if established, will mandate consolidation in every instance." *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bktcy., D. Mass. 1982). Instead, "the enumerated factors should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice the moving creditor alleges it suffers from debtor separateness". *In re Donut Queen, supra*, at 709-10.

61. The Court also may approve substantive consolidation when the expense and difficulty of determining intercompany claims, liabilities, and ownership of assets is substantial. *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d. Cir. 1966); *In re Nite Lite Inns*, 17 B.R. 367, 371 (Bktcy. S.D. Cal. 1982).

62. On the facts established here (Paragraphs 29 through 41, above), substantive consolidation is appropriate. Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example:

(a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), (ii) MCC's assets (because of MCC's role as a general partner), (iii) Holywell's assets (net of its liabilities), by levying upon Gould's ownership of 100% of the stock of Holywell, and (iv) Chopin's assets (net of its liabilities), since it is owned 36% by Gould and 64% by MCC. The pertinent provisions of Florida's partnership laws are:

(1) *620.62 Partnership bound by partner's wrongful act.* When loss or injury is caused to a partner in the partnership . . . the partnership is liable for it to the same extent as the partner so acting or omitting to act.

(2) *620.625 Partnership bound by partner's breach of trust.* The partnership is bound to make good the loss:

(i) When one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(ii) When the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by a partner while it is in the custody of the partnership.

(3) *620.63 Nature of partner's liability.* All partners are liable:

(i) Jointly and severally for everything chargeable to the partnership under §§ 620.62 and 620.625.

(b) The foregoing statutes, which extend to breaches of contract by Gould, also make MCLP and Chopin responsible for any liabilities of Gould incurred in connection with the Miami Center Project.

(c) Similarly, a creditor of Holywell ultimately could reach (i) MCC's assets (net of its liabilities), because MCC is 100% owned by Holywell, (ii) MCC's ownership, in turn, of 47.88% of MCLP and 64% of Chopin, (iii) Gould to the extent he acted as director or president of Holywell to misapply Holywell's funds (see Paragraph 37, above), and (iv) MCLP because of Holywell's alleged ownership of a claim for over $4 million against MCLP (see Paragraph 35(a), above).

(d) Finally, creditors of MCC and Chopin eventually could reach those debtors' partnership interests in MCLP

and therefore the net assets of MCLP itself (under Sections 620.62 and 620.625, Florida Statutes, *supra*), and a creditor of Chopin could reach the assets of both MCC and Gould (because each is a general partner of Chopin).

63. The Court found [C.P. No. 844, page 97], that the alternative to substantive consolidation, "would appear to be an unncessarily circuitous, time-consumming, and expensive exercise that might conceivably lead to the diversion of some assets which, under the principles of law as I understand them, ought to be available for the satisfaction of these obligations". In short, if the creditors of the five separate estates seek to assert their claims against the primary obligors, the other estates which have contingent or secondary liability under Florida law for those claims may be closed (and any residue diverted or misapplied) before the primarily liable estate is exhausted. Substantive consolidation avoids the unfairness inherent in such a result.

64. Analyzing the seven factors enumerated in *In re Donut Queen*, *supra*, the Court concludes that:

(a) Consolidated financial statements were prepared as to Holywell, MCC, and MCC's interests in Chopin and MCLP (see Paragraphs 32 and 39, *supra*). In addition, even the debtors' bi-weekly debtor-in-possession reports were prepared on a consolidated basis during the period before confirmation [see, for example, C.P. No. 423].

(b) There is a single common element of interest, control, and ownership of all five debtors: Theodore B. Gould.

(c) The debtors' schedules reflect numerous cross-guaranties of loans and other obligations of the debtors. In particular, all five debtors guaranteed all of the Bank's advances to MCLP and to Chopin (totalling over $240 million in principal and interest).

(d) The inter-company debts, in excess of $31.8 million, would require substantial accounting and legal expenditures to investigate and adjust. The costs of such an investigation would delay payments to unaffiliated creditors and would reduce the amount available to pay creditors. In light of the joint and several liability of several of the debtors under Florida law, such expenditures are not warranted.

(e) Gould operated the debtors without regard to their separate identities. He caused Holywell, for example, to advance $1.75 million to him without the formality of even a promissory note (see Paragraph 37, *supra*). He testified to numerous pre-petition transfers among the debtors and their affiliates [C.P. No. 385h, page 202].

(f) Business functions and assets were commingled. Certain debtors regularly paid obligations and performed services for other debtors and their affiliates, instead of letting the beneficiary pay or perform directly [C.P. No. 385h, pages 45, 55, 67-69, 141].

(g) The debtors can operate (and are operating) successfully at a single location. Having announced an intention to leave Miami, the debtors' single office is now in Charlottesville, Virginia [C.P. No. 844, page 50].

65. Each of the seven factors supports substantive consolidation in this case. Moreover, there is no prejudice to the creditors. The creditors did not object to substantive consolidation, and the Creditors' Committees supported that aspect of the Bank's plan.

66. The debtors have claimed prejudice, but have not proven it. At the hearing on July 18, 1985 [C.P. No. 844, page 68], the debtors indicated no objection to consolidation except in the case of Holywell's consolidation with MCLP:

> [The Court]: . . . if the—well, let me ask a preliminary question—the nub here, the serious problem

> and the only serious problem, I take it, that the debtor has with consolidation is the attempted consolidation of Holywell and MCLP?
>
> [Debtors' Counsel]: That's correct, and Holywell is the one objecting.

The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately $17 million in Federal income taxes" [C.P. No. 580, page 2].

67. Based upon all of these factors and the authorities previously cited, and in the exercise of its equitable powers under Code Section 105(a), the Court finds that substantive consolidation in the minimal form proposed by the Bank is equitable, is in the best interest of the creditors, and (because of the substantial unity of ownership interests in all five debtors in Gould) does not unfairly prejudice the debtors. As provided by the Bank's plan, each debtor will retain its individual name, form of organization, and the right to continue business, after discharge. The debtors will not disappear in a merger-like consolidation as is sometimes sought in such cases. The Bank's plan does require that each debtor's assets be exposed to the claims of creditors of all of the related estates, however, so the Bank has labelled that aspect of its plan as "substantive consolidation." The Court finds that the Bank has accepted and satisfied its burden under applicable precedent. The Court does not believe that the hundreds of creditors involved here should be required to engage in a shell game or to have to guess which debtor is most likely to be able to pay. Many of the creditors are not represented by counsel and apparently are not even aware that they have claims against several of the estates under Florida law, rather than just the single estate of the primary obligor. The need for credi-

tors to file such claims and to trace assets is completely attributable to the labryinth that Gould has created. Consolidation here will not make any debtor pay any creditor unless that debtor or one of its secondarily-liable co-debtors (principally Gould) was legally responsible for the claim involved.

T. *Classification*

68. Section 1122(a) of the Code directs that, with a single exception not applicable here, "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

69. The creditors that have objected to a junior classification hold claims that are markedly dissimilar, both as to the ultimate effect of payment of the claim and as to the special property held by the claimant (see Paragraphs 42 through 45 above). In the case of MCJV:

(a) Payment of MCJV's claim will benefit debtor Gould's 50% equity interest in MCJV by 50% of the payment. MCJV's claim is in essence a hybrid of debt (to the extent that O&Y, a non-debtor is benefitted) and equity (to the extent that a debtor, Gould, is benefitted.

(b) MCJV's claim can readily be satisfied from special property (the four downtown lots, appraised at $104 million) held by MCJV and not directly available to satisfy the claims of creditors that are not affiliated with Gould. MCJV's claim can be satisfied by merely reducing Gould's equity interest in, and other claims against, MCJV. Under the equitable principle of marshalling, MCJV may be required to look first to a source of recovery unavailable to other competing creditors. *In re All American Holding Corp.*, 10 B.R. 71, 73 (Bktcy. S.D. Fla. 1981), *aff'd* 17 B.R. 926, 928-29 (S.D. Fla. 1982). *Matter of Emerald Hills Country Club*, 32 B.R. 408, 421-22 (Bktcy. S.D. Fla. 1983).

70. In the case of HTC and HLC, both are wholly-owned subsidiaries of a debtor and are completely controlled by Gould. It would be inequitable to permit such claimants to share ratably with unaffiliated unsecured creditors. To do so here would be to violate the absolute priority rule by permitting a debtor and its equity interests to share equally and in parity with an unsecured creditor. In view of Gould's undisputed control of these claimants, they were properly classified below the general unsecured creditors.

71. In the case of O&Y, the marshalling analysis set forth above is also applicable. As the only other general partner of MCJV, O&Y has access to a special source of recovery (Gould's ownership interest in MCJV) that is unavailable to other creditors. Additionally, any payment to O&Y reduces O&Y's parallel claim against MCJV in the remanded arbitration proceedings now pending between O&Y and Gould, thereby increasing Gould's 50% equity interest. By reducing the aggregate liabilities of MCJV, any such payment benefits Gould by an amount equal to 50% of the payment. That is not the case with respect to payments made by the debtors to unaffiliated creditors. The Court also notes that the debtors' plans [C.P. No. 466-70] classified O&Y separately, based upon the fact that O&Y has recourse to the MCJV property. The debtors' plans contemplated that O&Y would not be paid until (a) the arbitration and litigation between O&Y and Gould reached an end and (b) MCJV sold a substantial part of its real estate.

72 Each of these objecting affiliated creditors is an "insider" under 11 U.S.C. § 101(28)(A) (subparagraph (ii), as to MCJV; subparagraph (iii), as to O&Y; and subparapraph (iv) as to HTC and HLC). On facts similar to those here it has been held that an insider may not, "share the same priority with general unsecured creditors of the Debtor". *In re Economy Cast Stone Co.*, 16 B.R. 647, 651 (Bktcy. E.D. Va. 1981); *In re Toy &*

Sports Warehouse, 37 B.R. 141 at 152 (Bktcy. S.D.N.Y. 1984)

73. The debtors' proposed plans also accorded a junior priority to the claims of "affiliated Creditors", defined to include entities "in which the Debtor owns an equity interest", thereby assigning a junior classification to the claims of MCJV, HTC, and HLC [C.P. No. 466-470, Exhibit "A", pages 1-2].

74. The unaffiliated creditors would not likely have accepted a plan which gave higher or equal dignity to the claims of Gould-controlled equities. The claims of the Gould-controlled entities are not "substantially similar", either legally or in practical effect, to the claims of the unaffiliated creditors assigned separate and senior classes by the Bank's plan. Accordingly, the Bank's classification structure complies with 11 U.S.C. § 1122(a).

U. *Equitable Subordination*

75. Based upon the Court's findings with respect to Gould's conduct (Paragraphs 46-48), the Court concludes that equitable subordination under Sections 510(c) of the Code and the tripartite test of *Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977), is warranted. The claims of MCJV, O&Y, HTC, and HLC warrant equitable subordination because Gould's misconduct, and the attendant prejudice to other creditors, is imputed to those claimants as a matter of Florida partnership law and the law of agency. MCJV and O&Y themselves alleged such misconduct in their objections to the debtors' plans (Paragraph 9(a)(2), 9(a)(7), above). On the record here, Gould will not be permitted by this Court to receive distributions before, or even on a parity with, the unsecured creditors.

V. *District Court Action*

76. The Court has performed the "cost/benefit" analysis of the District Court Action, as suggested by the

debtors. *Matter of Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980); *TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 20 L.Ed. 2d 1, 88 S. Ct. 1157 (1968).

77. The Court concludes (see Paragraphs 54-56) that the claims asserted in the District Court Action are barred (a) by the releases executed by the debtors and (b) by this Court's memorandum decision [C.P. No. 20 in Adv. Pro. 85-6160], which bars re-litigation of the release issue. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984). Based upon that conclusion and the testimony of the only expert witness to address the matter, the District Court Action is not worth the cost of prosecution.

78. The Bank's plan and the Liquidating Trustee may lawfully dismiss the District Court Action. The District Court Action is an asset of the debtors' estates subject to the jurisdiction of this Court. 11 U.S.C. § 541(a)(1); *In re AutoWest, Inc.*, 43 B.R. 761, 763 (D. Utah 1984). The Bank's plan provided that ownership of the District Court Action passed to the Liquidating Trustee, who thereby acquired the power to pursue, abandon, or compromise the claims. 11 U.S.C. § 1141(c). This Court has not in any way encroached upon the jurisdiction of the District Court. Ownership of the District Court Action passed to the Liquidating Trustee when the debtors failed to stay consummation, and the Liquidating Trustee has stipulated to dismissal of the lawsuit. In doing so, the Liquidating Trustee was performing a condition precedent to the realization of significant benefits for the estates—the closing of the sale of the Project, the resultant infusion of millions of dollars of new cash, and the release of over $30 million of the Bank's cash collateral.

W. *Confirmation Requirements*

79. The parties' certificates on the voting [C.P. No. 658-64] were verified by the Clerk's office.

80. The debtors' plans failed to receive acceptance under 11 U.S.C. § 1126(c). I also conclude that the debtors' plans were not feasible because of the delays and contingencies inherent in both the Hadid contract and the attempt to subordinate the Bank's $240 million claim. Finally, the debtors' plans cannot be confirmed because of the Court's finding (Paragraph 28) that consummation likely would have been followed by liquidation or the need for further financial reorganization. 11 U.S.C. § 1129(a)(11).

81. The stipulations [C.P. No. 564, 614, 709c, and 876a] and second amendment [C.P. No. 854] did not adversely affect any party other than the Bank, and therefore did not require a supplemental disclosure statement or hearing for purposes of Code Section 1127. The Bank's plan as so amended was accepted by the requisite number of creditors in Classes 1 through 6. (Paragraph 15; 11 U.S.C. § 1126(c)). The Gould-affiliated Classes (7 through 9) rejected the Bank's plan.

82. The Bank's plan does not discriminate unfairly, and is fair and equitable with respect to each of the three classes that did not accept it. The Bank's plan complies with Sections 1129(a) and (b) of the Code:

(a) The Bank's plan complies with the applicable provisions of Chapter 11 of the Code.

(b) The Bank, as proponent of its plan, has also complied with applicable provisions of Chapter 11.

(c) The Bank's plan has been proposed by the Bank in good faith, and not by any means forbidden by law.

(d) Any payments made or promised by the Bank for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, have been disclosed to the Court; there are no such payments to be made before confirmation; and each such payment to be fixed after confirmation is subject to the approval of this Court as reasonable.

(e) The Bank has disclosed the identity and affiliations of the Liquidating Trustee, and the Trustee's appointment and continuance in office are consistent with the interests of the creditors and equity interest holders, and with public policy. Section 1142 of the Code specifically contemplates the possibility that a liquidating trust and trustee may be the entities designated by a plan to carry out the plan after confirmation. Further, the Bank has disclosed the identity of any insider that will be employed by or retained by the reorganized debtors, and the nature of any compensation for such insider.

(f) There are no regulatory commissions with jurisdiction (for purposes of Section 1129(a)(6)).

(g) With respect to each impaired class of claims or interests, (1) each holder of a claim or interest of such class has (A) accepted the Bank's plan or (B) will receive or retain under the plan on account of such claim or interest property of a value, as of the "Effective Date", that is not less than the amount such holder would receive or retain in liquidation, or (2) if Code Section 1111(b)(2) applies to the claims of such class, each such holder will receive or retain on account of such claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims. Under the Bank's plan, all mechanics' lienors are paid in full, so the debtors' objections regarding the priority of such liens are moot.

(h) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Bank's plan provides that: (1) with respect to a claim of a kind specified in Sections 507(a)(1) or 507(a)(2) of the Code, on the Effective Date, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (2) with respect to a class of claims of a kind specified in Sections

507(a)(3), 507(a)(4), or 507(a)(5) of the Code, each holder of a claim of such class will receive, if such class has accepted the Bank's plan, deferred cash payments of a value, as of the Effective Date, equal to the allowed amount of such claim (or, if such class has not accepted the plan, cash on the Effective Date equal to the allowed amount of such claim); and (3) with respect to a claim of a kind specified in Section 507(a)(6) of the Code, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of such claim, of a value, as of the Effective Date, equal to the allowed amount of such claim.

(i) At least one class of claims has accepted the Bank's plan, determined without including any acceptance of the plan by an insider holding a claim of such class.

(j) Confirmation of the Bank's plan is not likely to be followed by the liquidation, or the need for further financial reorganization, or the debtors or any successors to the debtors under the Bank's plan, except to the extent that liquidation or reorganization is proposed by the plan.

(k) With respect to the impaired classes and creditors that rejected the Bank's plan (MCJV, O&Y, the debtors, and the debtors' affiliates) and the requirement of Code Sections 1129(a)(8) and 1129(b), the Bank's plan does not discriminate unfairly and is fair and equitable with respect to each such impaired class of claims:

(1) Each holder of an impaired secured claim has retained the lien securing such claim, to the extent of the allowed amount of such claim, and will receive on account of the claim deferred cash payments totalling at least the allowed amount of the claim and of a value, as of the Effective Date, of at least the value of such holder's interest in the debtors' interest in such property.

(2) (A) Each holder of an impaired unsecured claim has received or retained on account of such claim property of a value, as of the Effective Date, equal to the allowed amount of such claim, or (B) the holder of any claim or interest junior to the claims of such impaired, unsecured class will not receive or retain any property on account of that junior claim or interest.

(3) (A) Each holder of an interest will receive or retain on account of such interest property of a value, as of the Effective Date, equal to the value of such interest (no such holder is entitled to a fixed liquidation preference or fixed redemption price, so far as the record reflects), or (B) the holder of any interest junior to the interests of such class will not receive or retain any property on account of that junior interest. The priority of distribution to Holywell creditors pursuant to stipulation does not adversely affect any equally-situated creditors, since all creditors through Class 6 will be paid in full. Accordingly, the Bank's plan was and is entitled to confirmation.

In accordance with the Order of Remand, the foregoing findings of fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc*.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

See attached service list.

APPENDIX 12

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

IN RE: HOLYWELL CORP., *et al.*
Debtor(s).

Adv. No. 85-0566-BKC-TCB-A

THE BANK OF NEW YORK
Plaintiff,

v.

OLYMPIA & YORK FLORIDA EQUITY CORP.
O & Y EQUITY CORP., THEODORE B. GOULD,
MIAMI CENTER JOINT VENTURE
Defendants.

MEMORANDUM DECISION

The issue here is whether two agreements executed in May 1981, in which Miami Center Joint Venture leased certain personal property to Miami Center Limited Partnership are "true leases" or are in effect conditional sales and therefore "leases intended as security". I concluded that they are true leases.

The personal property is furnishings, fixtures and equipment that were purchased to equip a hotel in Miami. The building is owned and operated by the lessee which is a chapter 11 debtor in this court. The leased personal property cost $7.8 million.

The lessor joint venture was formed two months before the lease. Its two general partners are T. B. Gould, another chapter 11 debtor in this court, and Olympia and York Florida Equity Corporation (O & Y), which loaned the lessor the $7.8 million that funded the purchase of the equipment. These two partners have been constantly at each other's throat in various courts since shortly after the leases were executed, but they are on the same side here.

Gould is not only one of the general partners of the lessor joint venture, he also controls three other related chapter 11 debtors in this court.

The plaintiff bank was the construction lender for the hotel and office buildings. It is owed $50 million on its mortgage and is the largest creditors of the five related debtors which are dominated by Gould. Its chapter 11 plan to liquidate these five debtors' assets and distribute the proceeds is presently under consideration by this court along with competing plans presented by Gould.

The bank seeks a determination that the two leases are not true leases. The four defendants urge the contrary. The matter was tried on May 30.

If the leases are "true leases", the leases will be "assumed" under 11 U.S.C. § 365 under each of the competing plans. If reorganization fails, a liquidating trustee will also, as a practical matter, require the leased equipment. Assumption requires that the lease defaults be promptly cured. The accrued, unpaid rent to date is between $6.1 and $13 million depending on when the leases commenced, a disputed point not yet addressed by the parties. If the leases are found to be "true leases", no one would receive a windfall or gain any other inequitable advantage.

If on the other hand, the two leases are not "true leases," as the bank argues, the bank will come out of

reorganization at least $10 million ahead of what it stands to recover if the two leases are given effect. This would be a complete windfall for the bank. The principal loser will be O & Y, which provided the purchase money for the equipment. No rent has ever been paid on the leases. O & Y's only recourse is against the lessor, which would lose title to the equipment and would itself become the holder of a worthless claim against the lessee for an unperfected security interest. Similarly, O & Y's claim against the lessor would be a claim as an insider, which would be behind all the claims of other creditors. O & Y's claim would be rendered virtually worthless.

The predicate for the bank's contention is UCC § 1-201(37), *Fla. Stat.* § 671.201(37):

> "(37) 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. . . Unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest, but a consignment is in any event subject to the provisions on consignment sales (s.672.326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

A "security interest" if not perfected becomes unenforceable against a bankruptcy trustee, 11 U.S.C. § 544, and therefore against the lessee here, which is a chapter 11 debtor-in-possession. 11 U.S.C. § 1107(a). These leases expressly prohibited the assertion of perfection of any security interest against the lessee.

The leases were executed for each party by Gould in his capacity as general partner of each entity. He denies any intention to create anything other than a true lease. It is undisputed that Metropolitan Life, the prospective permanent lender for the buildings, insisted that the equipment be leased and there be no perfected security interest against the property. It also reviewed and approved the leases, as did the plaintiff bank, before they were executed. Metropolitan's motives do not appear in this record. It has not been suggested that Gould had anything to gain by leasing the equipment rather than by purchasing it with borrowed funds collateralized by the equipment. I am satisfied that his only motive was to satisfy Metropolitan.

Until this action was filed six weeks ago, no one has suggested that the leases are not true leases any time during the four years they have been in existence. Indeed, the bank's disclosure statement supporting its plan describes and treats the leases as leases, not as disguised conditional sales.

Neither the history nor the form of the documents, the direct testimony of the parties as to their intent, nor the contemporaneous acts of the parties support the bank's contention that the parties intended a conditional sale rather than a true lease. It is the bank's argument that the terms of the leases compel the conclusion that the parties in fact intended a conditional sale.

In *American Standard Credit Inc. v. National Cement Co.*, 643 F.2d 248, 261 (5th Cir. 1981) the court noted that the question whether particular transactions are "true leases" or "leases intended as security" is one of the most hotly litigated topics in commercial law, that there is considerable conflict among the various jurisdictions, and that federal courts are bound to apply the interpretations of the applicable State court "insofar as such interpretation may be discerned." It dealt with an Alabama lease.

Florida law is controlling here and the only reported case from a Florida court is *U. C. Leasing, Inc. v. Barnett Bank of West Florida*, 443 So.2d 384 (Fla. Dist. Ct. App. 1983). This decision affirmed a trial court's holding that a bank's perfected security interest in certain equipment was superior to a purported lessor's claim which had not been recorded as a security agreement. The trial court found the equipment lease to be not a "true lease" but rather a "secured transaction."

In this reported decision, neither the lessor nor the bank stood to gain a windfall. Each was the innocent vitcim of a merchant who executed separate inconsistent agreements, first to lease from the lessor then to pledge the leased equipment to the bank for a loan.

Neither this decision nor any I have seen applied UCC § 1-201(37) where the result is to give one party a windfall at the expense of an innocent party. The legislative purpose was to protect the lessee's other creditors from fraud and deception. There is nothing in the record before me that suggests that anyone was misled or deceived by the leases in question here. Certainly the bank was not misled or deceived in anyway.

UCC § 1-102(1), *Fla. Stat.* § 671.102(1), requires that:

> "This code shall be liberally construed and applied to promote its underlying purposes and policies."

To construe and apply the code to produce the result urged here by the bank would defeat the purpose and policy of the code. It is a shield, not a sword.

Furthermore, the Florida court identified features of the transaction before it which prompted its conclusion, at least four of which are absent in our case.

1. There, the option price given the lessee to acquire title was "nominal" about 10% of the initial price. In our case the option price is *the greater of the unrecovered*

original cost or the market value at the time the option is exercised. The only evidence of market value is an appraisal eight months ago of $7.7 million, 99% of the purchase price. I find that plaintiff has failed to carry its burden of showing that the option price would be "nominal" at any time during the 60-month life of these leases.

2. There, the initial payments, monthly payments, and option prices were readily equated to the current rate of interest and the lessor admitted that the payments were determined by and related to the cost of funds and interest rates. Of course, every lessor must consider and try to recoup its investment, but in our case, there was no down payment, no such congruency, and no such admission as was before the Florida court. We have two leases executed on the same day involving the same kind of property, but which produce two different rates of return for the lessor.

3. There, the lessor required a guaranty of payment. There is none here.

4. There, the lessee was granted the investment tax credit. Here, the lease givs it to the lessor which has used it.

U. C. Leasing, therefore, is readily distinguishable from the case before this court.

In *American Standard Credit*, the Fifth Circuit reversed the district court's holding that the equipment lease in question there was not a true lease. The seven factors which the court found to be crucial to its conclusion are each paralleled here. *Id.* at 266.

I have made no reference to defendants' argument that plaintiff is estopped or has waived its right to make the argument it has made here, because I do not find the elements of either defense in this record. No party justifiably relied to its detriment on any conduct of the

plaintiff and there is no clear evidence of an intent on the part of the bank to give up this contention.

The bank has asked, in the alternative, that this court define what must be paid to the lessor to assume and cure the lease default. The parties have neglected this issue and a further hearing will be held on Monday, July 8, 1985, at 9:30 a.m., in Courtroom 1406, 51 S.W. 1 Avenue, Miami, Florida, to consider (a) motions for rehearing, (b) to hear the parties on the amount required to cure the lease defaults, (c) to hear any other issue necessary to the entry of a judgment in this adversary proceeding and, (d) to consider the effect of this decision on the pending, chapter 11 plans.

DONE and ORDERED at Miami, Florida, this 24th day of June, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies
Vance Salter, Esquire
Steel Hector & Davis
Attorney for Plaintiff
Scott Sheftall, Esquire
Floyd, Pearson, et al
Attorney for Miami Center J.V.
John Koyzak, Esquire
Attorney for O&Y Florida
Fred H. Kent, Jr., Esquire
Attorney for Theodore Gould
Emmet Marvin & Martin
Attorneys for BONY
Meyer, Weiss, Rose, et al
Attorneys for BONY

APPENDIX 13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Case No. 85-3230-Civ-ATKINS]

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,
Appellants,

vs.

THE BANK OF NEW YORK,
Appellee.

MEMORANDUM OPINION

Olympia & York Florida Equity Corporation (O&Y), as a general partner of Miami Center Joint Venture (MCJV), appeals from the bankruptcy court's Confirmation Order confirming a Chapter 11 plan of reorganization initiated by five debtors. Competing plans of reorganization were submitted to the creditors who rejected the debtors' plans and adopted the Bank of New York's (Bank's) plan. O&Y/MCJV asserts that its claim was improperly classified under this plan.

Pursuant to 11 U.S.C. § 1129(b), the court may confirm a plan even though a class has rejected it if all other requirements of § 1129(a) have been fulfilled and "the plan does not discriminate unfairly, and is fair and equitable," with respect to that class. *Id.* O&Y/MCJV, as the only creditors in Class 7, voted to reject the plan. Therefore, the question presented is whether the plan fulfilled the requirements of § 1129(b).

I. STATEMENT OF THE CASE

A. *The Parties and Their Respective Interests* [1]

The five debtors include the Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, A Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium," and an adjoining parking garage (collectively known as the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the existing Miami Center Project. Gould and O&Y, as the only partners, originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners has precluded further construction or development.

---

[1] Attached as court appendices I and II are two diagrams which set forth, graphically, the relationship between the various entities involved in this bankruptcy proceeding.

Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by the bankruptcy court, and have been active for the Holywell, MCLP, and MCC estates.

B. *General Background Information*

During the summer of 1984, the Bank initiated foreclosure proceedings in state court after declaring the debtor's mortgage loans on the Miami Center to be in default. The debtors quickly responded by filing their voluntary petitions for reorganization on August 22, 1984. During the Chapter 11 reorganization proceedings, the debtors and the Bank filed competing reorganization plans. The various creditors' committees and individual creditors rejected the debtors' plans and adopted the Bank's plan, although it was rejected by the impaired classes 7-9. This plan was then confirmed by the bankruptcy court over the Class 7 creditors' objection pursuant to 11 U.S.C. § 1129(b) (1979).

Several appeals were taken from the various bankruptcy proceedings. Two of these appeals were closely related to this one. In one, *Bank of New York v. Olympia & York Florida Equity Corp.*, No. 85-3430-Civ- ATKINS (June 23, 1986), the Bank sought reversal of a final judgment and related orders of the bankruptcy court in an adversary proceeding. The bankruptcy court found that certain lease agreements relating to furniture, fixtures, and equipment (FF&E) within the Miami Center project were "true leases." After reviewing the bankruptcy court's orders and the lease agreements, I affirmed. This action was significant because it formed the foundation for O&Y/MCJV's priority claims as the owner/lessor of the FF&E.

Another appeal went before Judge Aronovitz in which he was asked to review the same confirmation order as it related to other classes under the Bank's plan. After reviewing the confirmation order, he found that the bankruptcy court failed to enter clear and concise findings of fact and conclusions of law which would support its order; therefore, he remanded the case. Following the proceedings on remand, Judge Aronovitz affirmed the amended confirmation order as it related to those aspects of the Bank's plan on appeal before him.

Having resolved the "true lease" issue which established the nature of O&Y/MCJV's claim as to the FF&E, I carefully reviewed the confirmation order as it related to Class 7 of the plan. Like Judge Aronovitz, I found that is was necessary to remand the case for a more detailed order clearly elucidating the basis for the bankruptcy court's decision to place O&Y/MCJV's claim in class 7 of the plan.[2] On November 10, 1986, the bankruptcy court concluded its remand proceedings and entered its Order on Remand in which it adopted the proposed findings of fact and conclusions of law submitted

---

[2] Remand proceedings were appropriate under *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206 (5th Cir. 1983). There, the district court evaluated the record to find sufficient findings of fact to satisfy each of *Mobile's* three elements for equitable subordination. The Fifth Circuit remanded the case saying:

> These findings, though perhaps inherent in the bankruptcy court's ruling, were not enunciated. Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings *by the bankruptcy court* on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder.

Id. at 212 (emphasis added).

by the Bank.[3] Thus, the initial Confirmation Order, as amended by the adoption, *nunc pro tunc*, of the explicit findings of fact and conclusions of law, constitutes the foundation for O&Y/MCJV's appeal.[4]

C. *The Nature of the O&Y/MCJV Claim*

The appeal before this court concerns only the rights and claims of MCJV, prosecuted by O&Y as as its general partner, and managing venturer relating to the FF&E leases. Originally, O&Y filed separate claims as a creditor; however, in conjunction with the Trustee's consent to entry of the final modified arbitration award, O&Y issued a formal release of all its own claims against debtor Gould.[5] O&Y/MCJV asserts that it has priority

[3] O&Y/MCJV challenges the propriety of the bankruptcy judge's verbatim adoption of the Bank's proposed findings and conclusions, and asserts that the "blanket adoption" of one party's findings and conclusions indicates that the court failed to conduct a thorough, independent analysis of the evidence and the law. While this practice has been severely criticized, *see Cabriolet Porsche-Audio v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), it is permissible. *See Anderson v. Bessemer City*, 470 U.S. ——, 105 S.Ct. 1504 (1985). Nevertheless, such a practice invites particularly close scrutiny of the findings in light of the record.

[4] On remand, the bankruptcy court correctly determined that it was not called upon to alter or enhance the record. I simply wanted a more detailed explanation concerning the basis for the court's approval of the plan. Therefore, the record, as it stood at the approval of the plan. Therefore, the record, as it stood at the time of confirmation, must support the amended findings.

[5] O&Y and Gould initiated arbitration proceedings against each other in 1982 based upon their conflicting views regarding the operation of MCJV. The bankruptcy court permitted O&Y to pursue its rights under the relevant arbitration statutes and to proceed to an award in a court of competent jurisdiction, although it recognized that these proceedings could affect O&Y's and Gould's interests in MCJV. The final modified award was executed by the arbitrators on June 30, 1986 and entered as a judgment in the Florida Circuit Court on July 10, 1986.

claims for the market value of the FF&E, the cumulative defaulted rental payments and late charges accrued from March 1, 1983 to October 10, 1985, and defaulted rental payments and late charges from October 10, 1985.[6]

II. DISCUSSION

This appeal presents many complex legal issues. Over 400 parties struggled through the bankruptcy proceedings, under that court's supervision, attempting to make the best of an undesirable situation. The plan has been substantially consummated, and appears to have been successfully implemented.[7] Nevertheless, O&Y/MCJV vehemently objects to the placement of its claim concerning the FF&E into class 7 of the plan. Conversely, the Bank argues that this classification was eminently correct, because it satisfied all statutory requirements under the Code.

A. *Standard of Review*

A district court must accord substantial deference to the bankruptcy court's findings of fact, and should reverse only when they are "clearly erroneous." *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013. Moreover, the bankruptcy court's balancing of equities in analyzing the plan's fairness is a factual process, therefore, the court's determination on this point is also subject to the "clearly erroneous" standard of review. *Danning v. General Motors Acceptance Corp. (In*

---

[6] MCLP was supposed to make rental payments to MCJV under the lease agreement as of March 1, 1983. On October 10, 1985, the trustee transferred his interest in the FF&E to the Bank and its designated transferee.

[7] The claims classified under the plan from Class 1 to Class 6 have either been paid in full or funds have been reserved for the disputed items. In addition, in the most recent reports, the Liquidating Trustee estimated that approximately $3 million will be available to satisfy the remaining claims.

re Jules Meyers Pontiac, Inc.), 779 F.2d 480, 482 (9th Cir. 1985). Conclusions of law, however, are subject to plenary review. *Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980) (hereinafter referred to as "Multiponics").

B. *Classification Under The Code*

A Chapter 11 plan of reorganization may involve the sale of all or substantially all of the debtor's assets. 11 U.S.C.A. § 123(b)(4) (1979). After all, one of the primary goals of the bankruptcy code is to effectuate an equitable distribution of the debtor's assets in satisfaction of its debts. *Benjamin v. Diamond (In re Mobile Steel Co.,)*, 563 F.2d 692, 698 (5th Cir. 1977). To achieve the goal, the plan must group the claims or interests by classes. 11 U.S.C.A. §§ 1122, 1123 (1979) [8]; Bankruptcy

---

[8] 11 U.S.C.A. § 1122(a) provides:

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C.A. § 1123 provides (in pertinent part):

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
>
> (1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2) or 507(a)(7) of this title and classes of interests;
>
> (2) specify any class of claims or interests that is not impaired under the plan;
>
> (3) specify the treatment of any class of claims or interests that is impaired under the plan;
>
> (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
>
> (5) provide adequate means for the plan's implementation....

Rule 3013. "The classes which hold priority claims must be specially organized and full payment is mandatory although the payment may be deferred." R. Aaron, *Bankruptcy Law Fundamentals*, § 1.04 at 1-22 (1986) (footnote to citations omitted) .

The Bank urges that its plan is acceptable because the classification of the MCJV lease claims is fair and equitable, and does not discriminate unfairly under § 1129(b).[9] Furthermore, the Bank asserts that O&Y/MCJV's claim is not substantially similar to other claims or interests, because 50% of any distribution on MCJV's claim would go to debtor Gould. However, having reviewed the facts and the relevant legal principles, I conclude that the Bank is incorrect.

Under the Bank's plan, O&Y/MCJV's claim cannot be paid until all claims filed by other creditors not affiliated with Gould have been satisfied. In effect, this classification structure means that even general unsecured creditors will be paid before O&Y/MCJV. To justify its treatment of the O&Y/MCJV claim, the Bank relies heavily on the factual premise that any distribution on the O&Y/MCJV claim will benefit Gould. However, this premise is incorrect. Any payment to O&Y/MCJV based on the FF&E leases *would not* benefit debtor Gould. In fact, Gould's share of any MCJV proceeds, rents, or profits are available to the liquidating trustee, since "*all* legal or equitable interests of the debtor in property as of the commencement of the case," or any "[p]roceeds, . . .

---

[9] 11 U.S.C.A. § 1129(b)(1) provides:

> (b)(1) Notwithstanding section 510(g) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

rents, or profits of or from property of the estate . . ." become part of the bankruptcy estate. 11 U.S.C.A. § 541(a) (Supp. 1986) (emphasis added). *See also In re Wallen*, 43 Bankr. 408, 409 (D. Idaho 1984); *Houchen v. Gadberry (In re Gadberry)*, 30 Bankr. 13, 14 (C.D. Ill. 1983); *Dominican Fathers of Winona v. Dreske (In re Dreske)*, 25 Bankr. 268, 271 (E.D. Wis. 1982); *Don/Mark Partnership v. James B. Nutter & Co., (In re Don/Mark Partnership)*, 14 Bankr. 830, 832 (D. Colo. 1981); *cf. Missouri v. Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981) (court held that debtor's 2.3% fractional interest in deposited grain was sufficient to bring all property under the bankruptcy court's jurisdiction). In short, any interest Gould held in MCJV became part of the bankruptcy estate upon the commencement of this case.

The Bank's position is incorrect for another reason. The plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements, I disagree.

Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. *See Scherk v. Newton (In re Rocky Mountain Fuel Co.)*, 152 F.2d 747, 750-51 (10th Cir. 1945); *Seidel v. Palisades-on-the Desplains (In re Palisades-on-the Desplaines)*, 89 F.2d 214, 217 (7th Cir. 1937). *See also* 11 U.S.C.A. § 1129(b) (1979). A party submitting a plan of reorganization has considerable discretion to determine the proper classification of claims and interests according to the unique factual circumstances presented; however, ". . . there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise." *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck*

Co.), 800 F.2d 581, 586 (6th Cir. 1986). The result is not surprising—considerable discretion is permitted in determining the proper classification of claims and interests; however, if the plan unfairly creates too many or too few classes, or violates basic priority rights, the court cannot confirm the plan. *See id.* Thus, classification principles cannot be employed to effectuate the subordination of valid claims. *See In re Martin's Point Limited Partnership*, 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. § 1129(b).

One final point merits discussion under the "classification" issue. In its initial brief, the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim. *Id.* at 727 (". . . a claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to be treated equally.").

C. *Claims of An Insider*

In support of the plan's classification structure, the Bank emphasizes O&Y/MCJV's status as an insider.[10] The Bank argues that appellant's status is significant for two reasons. First, the Bank urges that insider creditors may not be given the same priority as unsecured creditors. *In re Toy & Sports Warehouse, Inc.*, 37 Bankr. 141, 152 (Bankr. S.D.N.Y. 1984) *In re Economy Cast Stone Co.*, 16 Bankr. 647, 651 (Bankr. E.D. Va. 1981). Alternatively, the Bank asserts that an insider creditor's claims must be closely scrutinized to determine whether equitable subordination is warranted. *Estates v. N&D Properties, Inc. (In re N&D Properties, Inc.)*, 799 F.2d

[10] MCJV is an insider because it is a "partnership in which the debtor is a general partner." 11 U.S.C.A. § 101(28)(A)(ii) (Supp. 1986). O&Y is an insider because it is a "general partner of the Debtor." 11 U.S.C.A. § 101(28)(A)(iii) (Supp. 1986).

726, 731 (11th Cir. 1986); *Multiponics*, 622 F.2d 709, 714 (5th Cir. 1980). If the claimant is an insider, the party seeking equitable subordination need present only "material evidence of unfair conduct," and need not provide proof of, "more egregious conduct such as fraud, spoilation or overreaching." *Estes* at 731.

O&Y/MCJV responds with two arguments. First, appellant contends that it is not an insider in the legal connotation of the term. Second, appellant assumes a "fallback" position arguing that the mere invocation of the term "insider" without more, does not serve to meet any standard or test required by law for equitable subordination.

The code is clear regarding the definition of an insider. In this case, it is beyond question that O&Y and MCJV are insiders. See 11 U.S.C.A. § 101(28)A(ii) and (iii). However, the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. *See Estes* at 731; *Multiponics* at 713; *Huffman* at 212. Further, appellant asserts that even where the claimant is an insider the proponent of the plan bears the burden of presenting material evidence of inequitable and unfair conduct damaging the creditors. *See Multiponics* at 714; *Estes* at 731.

Two cases are particularly relevant regarding the subordination of an insider's claim. In *Huffman*, the fifth Circuit found that "Huffman was an insider." *Id.* at 211. Nevertheless, the court indicated that the three-prong test of *Mobile* still had to be satisfied. "Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder." *Id.* at 212.

Very recently, the Eleventh Circuit examined this issue in *Estes*, and followed the teachings of *Mobile* and *Huffman*. The court expressly stated that three elements must be established before a claim may be equitably subordinated. *See Estes* at 731. Where the claimant is an insider, the trustee's burden of proof in establishing evidence of unfair conduct is somewhat lessened, but the claim is not automatically subordinated. *See id.*[11]

D. *Equitable Subordination*

The principle of subordination is firmly established in bankruptcy proceedings. This doctrine permits the court to lower the priority of a valid claim to achieve an equitable result when the claimant has been guilty of improper conduct.[12] *Collier on Bankruptcy* ¶ 510.02 (15th Ed. 1986). Although the doctrine was judicially created,[13] it has now been codified within the bankruptcy code. Currently, the relevant provision is found at 11 U.S.C.A. § 510(c) which provides:

> § 510 Subordination
>
> * * *
>
> (c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may—

---

[11] Significantly, I note that Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. *See* S. Rep. No. 989, 95th Cong., 2 Sess. 74 (1978); H. R. 31, 95th Cong., 1st Sess. (1975).

[12] Subordination is not the same as disallowance. "If a creditor's misconduct has been directed toward the debtor . . . the claim . . . is disallowed." 3 *Collier on Bankruptcy*, ¶ 510.02 (15th Ed. 1986). Subordination is employed when a claim is valid, but the claimant's conduct is such that equitable considerations require it to be paid after other claims have been satisfied. *See id.*

[13] Under the previous Act, courts subordinated creditor's claims based upon the bankruptcy court's grant of equitable jurisdiction. *See Pepper v. Litton*, 308 U.S. 295 (1939).

> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest, or
>
> (2) order that any lien securing such a subordinated claim be transferred to the estate.

Section 510(c) authorizes subordination when the court finds that an equitable remedy is required. Established case law, however, continues to be significant because § 510(c) indicates that its application should follow equitable principles. *See* 3 *Collier on Bankruptcy* ¶ 510.01 (15th Ed. 1986). To resolve subordination situations, the Fifth Circuit established a three part test to determine when a claim or interest should be subordinated. See *Mobile* at 700. This test has been expressly adopted by the Eleventh Circuit. *See Estes* at 731. The three elements of the test include:

> (1) that the claimant has engaged in inequitable conduct;
>
> (2) that the conduct has injured creditors or given unfair advantage to the claimant; and
>
> (3) that subordination of the claim is not inconsistent with the Bankruptcy Code.

Id. (citation omitted).

In proving the elements for equitable subordination, one must first determine the status of the claim holder.

> The burden and sufficiency of proof required are not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. Once the trustee meets his burden, the claimant then must prove the fairness of his transactions with the debtor or his claim will be subordinated. If the

> claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoilation, or overreaching, and prove it with particularity.

Id. (citations omitted). Additionally, the trustees, or other moving party, must show the extent of any inquiry or unfair advantage to determine the extent to which the claim should be subordinated. The claim should only be subordinated to the extent necessary to offset the harm caused by the unfair conduct. *See Benjamin*, at 701, "For example, if a claimant guilty of misconduct asserts two claims, each worth $10,000, and the injury he inflicted on the bankrupt or its creditors amounted to $10,000, only one of his claims should be subordinated." *Id.* at 701. Finally, the evidence must show which creditors were disadvantaged, because a valid claim should only be subordinated to the claims of the disadvantaged creditors. *See Estes* at 732-33.

In this case, the bankruptcy court appears to have relied upon three facts to fulfill *Mobile's* tripartite test. First, the court imputed Gould's acts of misconduct to O&Y/MCJV as a matter of partnership and agency principles. Second, the court found that O&Y/MCJV was responsible for MCLP's undercapitalization. Third, the court found that O&Y substantially contributed to MCJV's and Gould's financial difficulties, to the detriment of other creditors, by failing to provide or arrange for the financing of Phases II and III of the Miami Center.

O&Y/MCJV challenges all of these facts and asserts that there is no semblance of proof of wrongful conduct of the claimant/appellant affecting the debtors' creditors. First, O&Y/MCJV argues that all of Gould's acts of misconduct were outside the course and scope of the partnership's business. In fact, Gould's conduct was *against* O&Y and the partnership's interest. Therefore, appellant urges that Gould's misconduct cannot be used to sub-

ordinate its claim. Second, O&Y/MCJV suggests that the theory of undercapitalization of MCLP is outrageous and incomprehensible. Appellant insists that MCJV was the victim of, not a contributor to, MCLP's poor financial situation. Finally, appellant states that everyone recognized that the construction of phases II and III of the Miami Center would have subjected Gould to even greater losses and further indebtedness. Thus, appellant's failure to provide financing for further development could not have injured any of the debtor's creditors.

After carefully considering the facts, I conclude that the evidence was infficient to satisfy the elements of equitable subordination. First, I find that the court erred when it imputed Gould's acts of misconduct to O&Y/MCJV. These acts were clearly outside the ordinary course of the business of the partnership and not authorized by O&Y. *See Fla. Stat. Ann.* § 620.62 (1977).[14] Second, I simply cannot accept appellee's theory of undercapitalization. Perhaps the best indication that the FF&E lease was valuable was that the trustee was required to obtain title to the FF&E under the plan. Therefore, it is unreasonable to believe that the valuable FF&E lease agreements injured any of the debtor's creditors, even if I could somehow attribute MCLP's financial situation to O&Y/MCJV. Finally, I find that insufficient evidence was offered to prove that O&Y's failure to provide further financing hurt any creditors or gave O&Y

---

[14] *Fla. Stat. Ann.* § 620.62 (1977) reads as follows:

Partnership bound by partner's wrongful act.—When loss or injury is caused to a person, not a partner in the partnership, or any penalty is incurred by a wrongful omission *of a partner acting in the ordinary course of the business of the partnership or with the authority of his copartners*, the partnership is liable for it to the same extent as the partner so acting or omitting to act. (emphasis added).

an unfair advantage. Under the circumstances, O&Y's decision seems sound.

III. CONCLUSION

After carefully reviewing the amended confirmation order, I find that the court erred in confirming the plan which placed the O&Y/MCJV lease claim in class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the class 7 creditor. None of the theories presented by the Bank justify the subordination of O&Y/MCJV's claim. I must, therefore, remand the case so that the bankruptcy court can determine O&Y's share of the claim.

On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould).[15]

Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:

(1) First, from the cash which remains available to the trustee;

(2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and

(3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

For all of the reasons expressed in this opinion, the order of confirmation is reversed and remanded for further considerations not inconsistent with this opinion.

---

[15] O&Y and the Bank continue to dispute the interest each party holds concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceeds have had which would alter the general partners' 50% interests.

DONE AND ORDERED at Miami, Florida, this 24 day of March, 1987.

/s/ C. Clyde Atkins
C. CLYDE ATKINS
United States District Judge

cc: John Kozyak, Esq.
Albert I. Edelman, Esq.
Scott D. Sheftall, Esq.
Raymond W. Bergan, Esq.
Fred H. Kent, Esq.
Vance E. Salter, Esq.
Irving M. Wolff, Esq.

[Court Appendix I and II Omitted in Printing]

APPENDIX 14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-1317-CIV-Atkins

MIAMI CENTER JOINT VENTURE, *et al.*,
Appellants.

v.

THE BANK OF NEW YORK,
Appellee.

Case No. 87-1583-CIV-Atkins

MIAMI CENTER LIMITED PARTNERSHIP, *et al.*,
Appellants,

v.

THE BANK OF NEW YORK.

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER ON CLAIM NO. 502

THIS APPEAL challenges the Bankruptcy Court's order on Claim No. 502 allowing the claim in the amount of $14,557,754.00 Preliminary to calculating the amount of the claim, the court found that the claim presumed that the two executory contracts were assumed under the provisions of 11 U.S.C. §§ 365 or 1123(b)(2) and that the option to purchase contained in the leases had been exercised. This court agrees with the Bankruptcy Court's analysis and conclusion and affirms the order.

The facts of this case have been reiterated in numerous decisions and orders resolving the various and complex issues, *see, e.g., Holywell Corp. v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and will not be repeated here. At issue in this appeal is whether the Bankruptcy Court erred in its conclusion that the MCJV leases were assumed and in its calculation of damages.

The appellants believe that the statutory requirements which specify the time within which an executory lease may be assumed or rejected with court approval were not met nor was the default timely cured. The appellants contend that this mandates finding that the leases were rejected by operation of law. In addition, the appellants cite 11 U.S.C. § 365(e)(1)(A) and (B) which excuses a party from accepting performance from an assignee of an executory contract if "applicable law excuses a party" and that party does not consent. Florida law allows a party to withhold consent to a financially unsound party. Since Miami Center Joint Venture ("MCJV") did not consent to the liquidating trustee's assumption of the leases or assignment to the Bank's successor, the purported assumption is void. Finally, appellants assert that the purchase option was never exercised by the liquidating trustee. Since the Bank took possession it is liable for the resulting rent and late charges. Appellants list three components to their claim:

1. Rent and late charges from 3/1/83—10/10/85 owed by the liquidating trustee

$7,338,152.00

2. Rent and late charges from 10/10/85—3/1/87 and accelerated rent from 3/1/87—2/28/88 owed by the Bank

$6,812,080.00

3. The cost of the FF&E as appraised

$7,745,000.00

The appellee, The Bank of New York ("Bank") cites the confirmed plan which provided for assumption of the leases and points to the bond that this court required as "adequate assurance" that it would perform under the plan's Funding Agreement to provide cash for payment of Claim No. 502 if and when the claim was fixed and the other conditions of the Funding Agreement were met.

STANDARD OF REVIEW

A district court must accord substantial deference to the findings of fact made by the Bankruptcy Court. The district court may reverse those findings only when they are "clearly erroneous," *see Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983), however, conclusions of law are subject to plenary review. *See Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980).

ASSUMPTION

Under Title 11 U.S.C. § 365(a), a trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. Section 1123, which specifies the contents of a proposed plan, allows a plan to assume or reject any executory contract or unexpired lease not previously rejected. *See* 11 U.S.C. § 1123(b)(2). Therefore the unexpired MCJV leases could be assumed in the plan if they had not been rejected prior to its confirmation.

On April 28, 1985, Miami Center Limited Partnership ("MCLP") filed a timely motion to assume or reject executory contracts including the A and B leases. The Bank, MCLP, and Olympia & York ("O&Y") jointly moved to postpone the hearing on the motion. The Bankruptcy Court thereafter granted the Motion to Assume

or Reject on May 23, 1985. A trustee may assume or reject within a reasonable time and what constitutes a reasonable time for assumption or rejection is left to the Bankruptcy Court's discretion in light of all of the circumstances. *See Theatre Holding Corp. v. Mauro*, 681 F.2d 102 (2d Cir. 1982).

The Bank's reorganization plan, accepted by the creditors over the debtors' competing plans, was confirmed in August of 1985. On October 10, 1985, pursuant to the plan, the Miami Center was sold to the Bank's designee for $255.6 million dollars. The plan also required the Trustee to "take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases." The plan provided further that the Bank would receive "fee title to the FF&E covered by the MCJV Center Closing Date." The plan expressly provides for the assumption of the leases and the exercise of the purchase option in accord with the requirements of 11 U.S.C. § 365 and 1123 by requiring that the Trustee perform the necessary prequisites to the sale. There is nothing in the record to suggest that the leases had been rejected prior to their assumption by the plan and therefore the Bankruptcy Court was correct in implementing the express language and directive of the confirmed plan.

Appellants also argue that Florida law allows a party to refuse performance of a contract from an assignee. Although the appellants are correct in their statement of Florida law, they misconstrued its relevance in this instance, Title 11 U.S.C. § 365(f) provides for the assignment of an unexpired lease notwithstanding a provision restricting assignment. Although section 365(c) excuses a party from accepting performance from an assignee if the party does not consent, that section has been interpreted to apply only to personal service con-

tracts or contracts based upon personal trust or confidence. *See In re Boogaart of Florida, Inc.*, 17 B.R. 480, 487 (S.D. Fla. 1981) (citing 2 Collier on Bankruptcy, § 365.05 at 365-34 (15 ed. rev. 1981); *In re Taylor Manufacturing Co., Inc.*, 6 B.R. 370) Bkrtcy. N.D. Ga. 1980)). Since a lease of personal property like those at issue are not contracts for personal services or contracts that involve trust or confidence, that exception to assignment is inapplicable.

Title 11 U.S.C. § 365(b)(1)(A) requires that at the time of the assumption, the trustee must cure or provide adequate assurance that he will cure any default in the unexpired lease. The appellants contend that no such cure was proffered and therefore the attempted assumption is void.

Under section 365(b)(1)(A), "an immediate cure of arrearage or a tender is no longer absolutely required, provided 'adequate assurance' for the same is made in accordance with § 365." *Executive Square Office Building v. O'Connor and Associates, Inc.*, 19 B.R. 143, 148 (N.D. Fla. 1981). Neither is the "adequate assurance" measured by a strict yardstick. In *In re Boogaart*, 17 B.R. 480, the court determined that the record demonstrated the proposed assignee would generate the necessary income to meet its obligations to lessors and therefore the leases were assignable. The court in *In the matter of Southern Biotech, Inc.*, 37 B.R. 311, 314 (M.D. Fla. 1983), determined that the prompt curing requirement was met when it found that the trustee seeking to assume the contract would in all likelihood be able to cure within eight months. The Bankruptcy Court did not err in finding that confirmation of the plan was adequate assurance that the trustee would cure. In addition, as that court noted, the consolidated estates of the debtors were adequate for the purpose of curing the default and were "adequate assurance" of the trustee doing so.

THE AMOUNT PAYABLE TO THE LESSOR

The Bankruptcy Court found that the lessor is entitled to rent from March 1, 1983, to October 10, 1985. The court also found that the lessor is entitled to late charges and interest on the past due rent. Because this court finds that the Bankruptcy Court correctly determined that the leases were assumed and purchase options exercised, it further agrees with the calculation of the overdue rent, late charges, and interest. Neither did the court err in its finding that the purchase option price is the fair market value on the date of the exercise of the option with interest.

For the foregoing reasons, this court affirms the order of the Bankruptcy Court in its entirety.

DONE AND ORDERED at Miami, Florida this 4th day of April, 1988.

/s/ C. Clyde Atkins
C. CLYDE ATKINS
United States District Court

cc: Theodore Gould
Robert Musselman
Scott Sheftall
Vance Salter
S. Harvey Ziegler
Thomas Noone
Irving Wolff
Albert Edelman
Herbert Stettin
Robert Mark

APPENDIX 15

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORP., *et al.*
Debtor(s).

Adv. No. 85-0906-BKC-TCB-A

HOLYWELL TELECOMMUNICATIONS COMPANY, and
HOLYWELL LEASING COMPANY,
Plaintiffs,

VS.

THE BANK OF NEW YORK,
Defendant.

MEMORANDUM DECISION

At the trial held on August 8 upon this adversary complaint, the parties agreed that the only issue to be decided is whether two agreements entered into in February, 1983 between the plaintiffs and Miami Center Limited Partnership are "true leases" or are "leases intended as security." The lessee is a chapter 11 debtor in this court. A prior adversary proceeding involving this same debtor and a lessor joint venture formed by T. B. Gould, another chapter 11 debtor in this court, and a third party, O&Y Equity Corp., was decided against The Bank of New York on this same issue concerning two other leases.

The lessors in this case are subsidiaries of the debtor which were formed to lease furniture, fixtures and electronic equipment necessary for the operation of the debtor's luxury hotel and office building. The features of the transaction which were previously considered in analyzing the "A" and "B" leases are factually similar. I consider the fact that the "C" and "D" leases provide that the lessee may take the investment tax credit is not determinative of a different intent since the lessors actually took the tax credit.

The factual differences from the prior proceeding do not require a different result. I conclude that the subject leases, identified as category "C" and category "D" leases, are true leases. It is not necessary to repeat the discussion relevant to this issue contained in this court's memorandum decision of June 24, 1985. The factors considered and the discussion are applicable to this case.

The bank was not misled or deceived in either case. The bank's argument that Gould is not to be viewed as an innocent party and that his multiple entities served to give him an advantage to the detriment of his creditors does not overcome the fact that the windfall it could receive if there were no other way to avoid this claim is not justified under these facts.

I also find that the bank's argument that Gould engaged in a "shell game" where a lessee/lessor relationship never existed does not meet the burden of proof to support its counterclaim that the leases were in fact financing agreements.

Subsequent events have made it unnecessary, I believe, to determine the amount required to cure the defaults on these two leases. As required by B.R. 9021(a), a separate judgment will be entered declaring the category "C" and "D" leases to be true leases rather than security agreements.

DONE and ORDERED in Miami, Florida this 27th day of September, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Scott D. Sheftall, Esquire
Attorney for Plaintiff
One Biscayne Tower, 25th Floor
Miami, FL 33131-1868

Vance Salter, Esquire
STEEL, HECTOR & DAVIS
4000 Southeast Financial Center
Miami, FL 33131-2398

APPENDIX 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 85-3431-CIV-Kehoe

IN RE: HOLYWELL CORP., *et al.*,
Debtors

HOLYWELL TELECOMMUNICATIONS COMPANY AND
HOLYWELL LEASING COMPANY,
Appellants/Cross-Appellees,

v.

THE BANK OF NEW YORK,
Appellee/Cross Appellant.

MEMORANDUM OPINION AND ORDER OF REMAND

[Filed April 27, 1987]

This is an appeal by Holywell Telecommunications Company ("HTC") and Holywell Leasing Company ("HLC") from a Memorandum Decision issued by the Bankruptcy Court for the Southern District of Florida in an adversary proceeding styled *Holywell Telecommunications Company, et al. v. The Bank of New York*, Adv. No. 85-0906-BKC-TCB-A, and a cross-appeal by The Bank of New York ("The Bank") from a portion of the same Memorandum Decision. The adversary proceeding was

initiated as a part of ongoing proceedings commenced in August, 1984 by the filing of a Petition for Reorganization under Chapter 11 of the Bankruptcy Code by five (5) debtors [1] involved in the development of the Miami Center Project.[2]

After scrupulous consideration of the parties' briefs, the rulings below and the applicable law, this Court AFFIRMS the Bankruptcy Court's ruling as to the true lease issue presented in the Bank's cross-appeal,[3] and

---

[1] The five debtors are Theodore B. Gould ("Gould"); Holywell Corporation ("Holywell"), a corporation wholly owned by Gould, who was also its President, director and sole stockholder; Miami Center Corporation ("MCC"), a subsidiary of Holywell, which was its principal stockholder; Chopin Associates ("Chopin"), a general partnership whose sole general partners consisted of Gould and MCC; and Miami Center Limited Partnership ("MCLP"), of which Gould and debtor MCC were both sole general partners and limited partners, along with many others.

[2] The Project was Phase I of an overall development plan in downtown Miami. Chopin owned the underlying land and rented it to MCLP, which constructed the Project. Financing of the Project's construction was obtained by Chopin and MCLP from the Bank of New York ("the Bank").

Phase I consisted of the Edward Ball Office Building, the Pavillon Hotel (since renamed the Inter-Continental Hotel), a parking garage and retail space consisting of a restaurant and shipping mall. A portion of the furniture, fixtures and equipment ("FF&E") used for the Miami Center Project was rented by Miami Center Joint Venture ("MCJV"), of which Gould and Olympia and York Florida Equity Corporation ("O&Y") were managing venturers, under two leases labelled "A" and "B". The remaining FF&E were rented by HTC/HLC to MCLP pursuant to two additional leases, designated "C" and "D".

In 1982, Gould and O&Y initiated arbitration proceedings against each other, as a result of which no further development of an additional planned phase ("Phase II") took place.

[3] On August 26, 1986, this Court reserved ruling on the appeal and cross-appeal pending receipt of the Bankruptcy Judge's findings of fact and conclusions of law on remand from U.S. District Judge Atkins. Subsequently, HTC/HLC moved for a decision on the cross-appeal; the motion was granted. One day following this Court's

REMANDS HTC/HLC's appeal to the Bankruptcy Court for further findings of fact as indicated below.

I. *The Facts and Proceedings Below*

On February 1, 1983, HTC and HLC entered into two (2) leases (designated "C" and "D") providing for their rental of FF&E to debtor MCLP. Both HTC and HLC are wholly owned subsidiaries of debtor Holywell which, in turn, is wholly owned by debtor Gould. Gould was President of HTC and HLC, as well as managing general partner of debtor MCLP. The FF&E were purchased by HTC and HLC for $7,718,466. This amount was supplied to HTC and HLC by Holywell and Gould.

The Project did not succeed financially, and on August 22, 1984 MCLP declared its insolvency, together with debtors Gould, Holywell, Chopin and MCC. After evaluating the plans for reorganization submitted by the debtors and creditors, as well as the creditors' voting regarding such plans, the Bankruptcy Court adopted the Bank's Reorganization Plan in its Confirmation Order, issued August 8, 1985.

In its final amended form, the Plan provides for the sale of the Project, including the FF&E, to the Bank or its approved transferee, for $255,600,000, and the establishment of a Miami Center Liquidating Trust, consisting of all assets of the debtors, for payment of claims by a court-appointed trustee. The Plan substantively consolidates, *i.e.*, treats as common assets, the property of the five debtors' estates, including within such consolidation the claims of O&Y/MCJV and HTC/HLC for rent defaults and return of the FF&E, or for payment of their

---

issuance of an Order Granting Motion for Decision on the Cross-Appeal, the findings of fact and conclusions of law, incorporated in the Bankruptcy Judge's Order on Remand from Judge Atkins were submitted. Accordingly, the interests of judicial economy and convenience favor the Court's disposition of the main and cross-appeal in a single opinion.

fair market value under the purchase options of the A, B, C and D leases. The Plan further subordinates the claim of HTC/HLC to the claims of general unsecured creditors not affiliated with the debtors, and to the O&Y/MCJV claim.[4] Additionally, the Plan provides funding to pay the O&Y/MCJV claim in the event classification of their claim under the A and B leases is found improper. The Plan contains no parallel provision as to the HTC/HLC claim.

The Debtors appealed the Confirmation Order to federal district court, which remanded to the Bankruptcy Court for further findings of fact and conclusions of law. On March 20, 1986, United States District Judge Aronovitz affirmed the Confirmation Order and Plan, as amended by the Bankruptcy Judge in his Order on Remand, entered January 29, 1986.[5]

The Debtors and affiliated creditors sought to stay the Bankruptcy Court's Confirmation Order approving the Amended Reorganization Plan, but were unable to post the requisite appeal bond. On October 10, 1985, the Amended Plan went into effect. Since then, the Miami Center Project, including the FF&E, has been sold for the

---

[4] Pursuant to the Plan, the nine classes of claims are distributed as follows:

Class 1—Administrative claims; Class 2—Secured claim of the Bank for its loan to MCLP and Chopin; Class 3—Secured claim of the Bank for its loan to Holywell; Class 5—All other secured claims; Class 5—Claims entitled to priority under Section 507 of the Bankruptcy Code; Class 6—Claims of all general unsecured creditors; Class 7—O&Y/MCJV claim; Class 8—Affiliated creditors' claims (including that of HTC/HLC); Class 9—Claims of Debtors, as equity holders.

[5] Judge Aronovitz specifically excluded from his consideration those aspects of the plan challenged by O&Y/MCJV and HTC/HLC in their respective appeals before Judge Atkins and this Court, as described *infra*. *See Holywell Corp., et al. v. The Bank of New York*, Case No. 85-3225-CIV-Aronovitz, Order Affirming Confirmation Order and Plan at 20-23 (March 20, 1986).

price established under the Plan. Most of the creditors have been paid. Remaining unpaid are creditors who are unaffiliated with the debtors and whose claims are in dispute or litigation; O&Y/MCJV; HTC/HLC and the other affiliated creditors; and the debtors themselves.

On June 20, 1985, prior to the Bankruptcy Court's adoption of the Amended Plan, the Bank filed an adversary proceeding in Bankruptcy Court to determine whether the A and B leases were "true" leases or, instead, disguised financing agreements. On June 24, 1985, Bankruptcy Judge Britton issued a Memorandum Decision ruling that the leases were true and, accordingly, that O&Y/MCJV owned the underlying FF&E subject to MCLP's option rights. Not at issue in that proceeding was the priority of the O&Y/MCJV claim or the amount of it, in the event MCLP's option to acquire the FF&E were to be exercised.

HCL/HTC likewise filed an adversary proceeding to obtain a declaratory judgment that the C and D leases were "true" leases rather than financing agreements. They further requested clarification of the Bank's obligations once the leases were determined to be true. On September 27, 1985, the Bankruptcy Judge entered a Memorandum Decision which held the leases to be true ones. He declined, however, to determine the amount necessary to cure the defaults on the leases, finding that "subsequent events have made it unnecessary to do so." *Holywell Telecommunications Company, et al. v. The Bank of New York*, Adv. No. 85-0906-BKC-TCB-A, Memorandum Decision at 2 (June 24, 1985).

O&Y/MCJV appealed from the Plan and related orders, Bank filed a separate appeal from the Bankruptcy Court's challenging the Plan's classification of its claim. The Memorandum Decision which had found that the A and B leases were true leases. District Judge Atkins affirmed

the Bankruptcy Court on the true lease issue, but remanded the main appeal to the Bankruptcy Court for further findings of fact and conclusions of law. Following receipt of the Bankruptcy Court's Order on Remand, Judge Atkins entered a memorandum opinion reversing the Bankruptcy Court's confirmation of the Plan, on the grounds the O&Y/MCJV claim was improperly classified, and remanded to the Bankruptcy Court for a determination of the value of the lease claim and the relative interest in the claim held by O&Y/MCJV and the bankruptcy estate.

Similarly, HTC/HLC appealed to this Court the Bankruptcy Judge's failure to determine the amount necessary to cure the lease defaults; the Bank has cross-appealed the true lease ruling of the Bankruptcy Court.

II. *Standard of Review*

A Bankruptcy court's findings of fact may be reversed only if clearly erroneous. *Wilson v. Huffman* (In re Missionary Baptist Foundation of America), 622 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013. Conclusions of law, however, are subject to plenary review.[6] *Machinery Rental v. Herpel* (In re Multiponics), 622 F.2d 709, 713 (5th Cir. 1980).

---

[6] Since Bankruptcy Judge Britton's determination that the C and D leases are true ones arguably is a conclusion of law rather than an inference drawn from his findings of fact, it is subject to plenary review. *See, e.g., U.C. Leasing, Inc. v. Barnett Bank of West Florida*, 443 So.2d 384, 387-87 (Fla. 1st DCA 1983) (ruling that leases were not true ones designated as a conclusion of law). The factual findings upon which the Bankruptcy Judge based his decision, however, are reversible only if clearly erroneous.

At this time, the Court need not reach the issue of which standard of review applies to the merits of HTC/HLC's appeal, since the appeal is remanded herein for further factual findings by the Bankruptcy Court.

III. *The Cross-Appeal*[7]

Florida law[8] provides that whether a lease is a true one or, instead, is intended to create a security interest, is a matter "to be determined by the facts of each case." Fla. Stat. § 671.201(37)(1981). A variety of factors relevant to that determination have been identified by statute and case law. *Id.*; *U.C. Leasing, Inc.*, 443 So.2d at 385-87. *See also American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 266 (5th Cir. 1981).

Bankruptcy Judge Britton specifically considered such factors in reaching his ultimate conclusion that the C and D leases were indeed true ones. He determined, first, that the purchase option of each lease was not exercisable for nominal consideration, thus overcoming the provision of Section 627.201(37) of the Florida Statutes that "an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." The C and D leases specify that the option price is to be the fair market value at the time the option is exercised as long as that amount is not less than the unrecovered original costs:

> *Purchase Option.* Lessee shall have the option to purchase at any time all, but not less than all, the Equipment at a price equal to the fair market value thereof, as agreed upon by the parties hereto or, absent agreement, as determined by an appraiser

---

[7] A concern for judicial efficiency prompts the Court to address the cross-appeal initially, since in the event the cross-appeal were to prevail, the main appeal would be rendered moot.

[8] The leases expressly provide that they shall be governed by Florida law:

> This lease shall in all respects be governed by and construed in accordance with the laws of Florida.

Category C and D Leases at par. 28.

> selected by mutual agreement of the parties, but in no event less than the unamortized principal balance which would exist, as of the date of purchase of the Equipment, or a self-amortizing loan in the original principal sum of $3,351,491.50 at an interest rate of 15% and for a term of ten years, assuming payments of principal and interest commenced on the Lease Commencement Date.

Category C and D Leases at par. 16.

Judge Britton found that since the fair market value, based on the most recent appraisal, was 99% of the purchase price, the option price was not nominal. Additionally supporting his finding is the sole appraisal evidence offered at trial regarding the fair market value of the FF&E at the end of the lease term. This evidence consists of a third party appraiser's testimony that the amount would be "substantial." *Holywell Telecommunications Co., et al. v. The Bank of New York*, Adv. No. 85-0906-BKC-TCB-A, Trial Transcript at 69 (Aug. 8, 1985). The Bank dismisses the latter testimony as insignificant, in view of the lease's provision for setting the option price at the fair market value "as agreed by the parties." Category C and D Leases at par. 16. Since Gould controls both lessor and lessee, the Bank argues that he could, in effect, agree with himself to assign the FF&E a nominal market value. The Bank observes that Gould's intent to set a nominal price is demonstrated further by his representation in lessee MCLP's schedules that MCLP would own the equipment at the end of the lease term and by the fact that the amortization formula set forth in the option provision would be zero at the end of the same term.

Viewed reasonably on its face, however, the option provision appears to set the fair market value of the FF&E as the minimum option price. As indicated above, the evidence before Judge Britton established that this value

was substantial. The Court, therefore, cannot agree with the Bank that the purchase option provision provides for a nominal consideration and, as a matter of law, renders the lease a disguised security agreement. Neither can the Court concludes that Judge Britton's finding as to the nature of the option provision, based on his analysis of the relevant evidence, is one which may fairly be characterized as clearly erroneous.

As U.S. District Judge Atkins found in his memorandum opinion affirming Judge Britton's determination that the A and B leases were true ones, the lynchpin of a determination as to whether a lease is true or one intended for security is "the express manifestation of the parties' intent in the lease itself." *The Bank of New York v. Olympia & York Florida Equity Corp., et al.*, Adv. No. 85-0566-BKC-TCB-A, Memorandum Opinion at 7 (June 23, 1986) (citing *American Standard Credit, Inc.*, 643 F.2d at 266). Judge Atkins found the provision in the A and B leases that the Lessor's filing or recording of the lease does not evidence an intent to create a security interest manifests the parties' intent to create true leases. This same provision is present in the C and D leases and exhibits a parallel intent. *See* Category C and D Leases at par. 8. Further indicia identified by Judge Atkins and relied on by Judge Britton in his findings as to the C and D leases include the provisions in the leases that title and ownership of the FF&E is to remain at all times in the lessor and that the lessee must return the leased items if it does not exercise the purchase option.

Judge Britton additionally noted that the investment tax credit, although given by the leases to MCLP as lessee, was actually taken by HTC/HTC; no guaranty of payment by MCLP, as lessee, was required; and rent payments and option prices were not contingent upon the cost of funds and interest rates. *See American Standard Credit, Inc.*, 643 F.2d at 266; *cf. U.C. Leasing*, 443 So.2d at 385-7.

In opposition to the foregoing findings, the Bank points to the presence of other factors in support of its position. These consist of the lessee's responsibility for repair and maintenance of the F&E well as the payment of taxes and insurance; the agreement that the lessee bear the risk of loss; the fact that the lessors were not engaged in the manufacture or sale of equipment either at the time the leases were entered into or thereafter; the lessee's prerogative of specifying the type and amount of FF&E to be acquired; and the provision for remedies upon default, such as the acceleration of rent payments and the sale of the FF&E with the lessors reserving the right to a deficiency, which the Bank alleges are akin to those available to a secured creditor pursuant to the U.C.C. Even assuming these factors favor the Bank's characterization of the leases, Judge Britton's analysis remains both reasonable and well-supported. As he observed:

> The leases were executed for each party by Gould in his capacity as general partner of each entity. He denies any intention to create anything other than a true lease. It is undisputed that Metropolitan Life, the prospective permanent lender for the buildings, insisted that the equipment be leased and there be no perfected security interest against the property. Metropolitan's motives do not appear in this record. It has not been suggested that Gould had anything to gain by purchasing it with borrowed funds collateralized by the equipment. I am satisfied that his only motives was to satisfy Metropolitan.
>
> Until this action was filed six weeks ago, no one has suggested that the leases are not true leases any time during the four years they have been in existence. Indeed, the bank's disclosure statement supporting its plan describes and treats the leases as leases, not as disguised conditional sales.
>
> Neither the history nor the form of the documents, the direct testimony of the parties as to their intent,

> nor the contemporaneous acts of the parties support the bank's contention that the parties intended a conditional sale rather than a true lease.

The Bank of New York v. Olympia & York Florida Equity Corp., et al., Adv. No. 85-0566-BKC-TCB-A, Memorandum Decision at 4 (June 24, 1985).

On balance, therefore, the Court finds that the Bank has failed to demonstrate that the Bankruptcy Judge's findings of fact are clearly erroneous or that his ultimate conclusion that the leases were true ones is in error. Accordingly, that portion of the Memorandum Decision challenged in the Bank's cross-appeal is AFFIRMED.

IV. *The Appeal*

A. *Mootness*

The Bank argues, as a threshold matter, that the appeal is moot. As U. S. District Judge Aronovitz has cogently noted,

> The touchstone . . . of all determinations that a given suit or appeal is moot, is not the presence or absence of a single factual element (e.g., a sale of property). Rather the fundamental criterion for judging whether a case on appeal has become moot has consistently been whether the appellate court has been rendered incapable of granting effective relief to a petitioner due to a change in the circumstances of the case. *Mills v. Green*, 159 U.S. 65, 16 S.Ct. 132 (1895).

Holywell Corp., et al. v. Bank of New York, Case No. 85-3225-CIV-ARONOVITZ, Order of Remand and Denial of Motion to Dismiss at 16 (Dec. 30, 1985).

The primary issues raised in the present appeal are the propriety of substantive consolidation of the debtors' estates, including the C and D leases and underlying

FF&E, and equitable subordination of HTC/HLC's claim. In denying the Bank's motion to dismiss the debtors' appeal on the ground of mootness, Judge Aronovitz observed as follows:

> Reversal of the bankruptcy court's ruling on the equitable subordination of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, Inc. would . . . return these entities to their pre-confirmation status; here this would result in the three creditors being given the higher priority for their claims accorded to "arm's length" creditors.

Holywell Corp., et al. v. The Bank of New York, Case No. 85-3225-CIV-ARONOVITZ, Order of Remand and Denial of Motion to Dismiss at 17.

Moreover, since the mootness doctrine has been invoked successfully in regard only to matters concerning the sale of property, it is unclear whether it applies at all in the entirely distinct context of substantive consolidation. *Holywell Corp., et al. v. The Bank of New York*, Case No. 85-3225-CIV-ARONOVITZ, Order of Remand and Denial of Motion to Dismiss at 14-15 & cases cited therein.

For the reasons set forth above and in the remainder of Judge Aronovitz's carefully reasoned analysis, *see Holywell Corp., et al. v. The Bank of New York*, Case No. 85-3225-CIV-ARONOVITZ, Order of Remand and Denial of Motion to Dismiss at 13-19, this Court finds that effective relief may be afforded HTC/HLC in the event its appeal prevails.

B. *Timeliness*

The Bank further argues that HTC/HLC are estopped from bringing their appeal because they failed to file timely objections to the Bank's Plan. In support of that contention, the Bank points to the Bankruptcy Court's

dismissal, as untimely, of HTC/HLC's appeal from the Confirmation Order. *See In re Holywell Corp., et al.*, Case No. 84-01590-BKC-TCB, Order Granting Motion of Bank of New York to Dismiss Notices of Appeal of Confirmation Order (Nov. 14, 1985). However, in that same Order, Judge Britton took care to exclude from the effect of his dismissal the notices of appeal filed by HTC/HLC from his Memorandum Decision entered September 27, 1985. In so doing, Judge Britton expressly stated that the latter notices of appeal were "timely." *Id.* Since it is the Memorandum Decision entered in September which is the subject of this appeal, the Court finds no merit to the Bank's argument of untimeliness.

C. *The Merits*

HTC/HLC appeal that portion of the Bankruptcy Court's Memorandum Decision embodied in the following single sentence:

> Subsequent events have made it unnecessary, I believe, to determine the amount required to cure the defaults on these [the C and D] leases.

Holywell Telecommunications Co., et al. v. The Bank of New York, Adv. No. 85-0906-TCB-A, Memorandum Decision at 2 (September 27, 1985).

Both HTC/HLC and the Bank have construed the phrase "subsequent events" as signifying the Bankruptcy Judge's affirmance of the Plan's substantive consolidation of debtor MCLP's option to purchase the leases with the remainder of the bankruptcy estate and its equitable subordination of the HTC/HLC claim to Class 8. Accordingly, the parties to this appeal have engaged, respectively, in challenging and justifying these two features of the Plan. Assuming the parties have correctly interpreted the significance of Judge Britton's invocation of "subsequent events," this Court concludes that the Bankruptcy Judge has not sufficiently articulated the factual basis for his ruling.

In his Order of Remand, Judge Aronovitz stressed that the propriety of substantive consolidation and equitable subordination is contingent on the presence of specific factors, as follows:

> To support its order of substantive consolidation, for instance, the trial court would have had to find the existence of certain, widely accepted factors which justify this extraordinary remedy which, if employed inappropriately, can result in unfair treatment of both debtors and creditors. *In Re Flora Mir*, 432 F.2d 1060 (2nd Cir. 1970). Those factors are set out in *In Re Donut Queen*, 41 B.R. 706, 709 (S.D.N.Y. 1984) and include the following:
>
> 1. The presence or absence of consolidated financial statements.
>
> 2. The unity of interests and ownership between the various corporate entities.
>
> 3. The existence of parent and intercorporate guarantees on loans.
>
> 4. The degree of difficulty in segregating and ascertaining individual assets and liabilities.
>
> 5. The commingling of assets without formal observance of corporate formalities.
>
> 6. The commingling of assets and business functions.
>
> 7. The profitability of consolidation at a single physical location.
>
> In the same manner, a bankruptcy court, before it can justly order the equitable subordination of otherwise prior claims must first find that the following three tests are satisfied:
>
> 1. The claimant must have engaged in some type of inequitable conduct.

> 2. The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
>
> 3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.
>
> *Matter of Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977)

Holywell Corp., et al. v. The Bank of New York, Case No. 85-3225-CIV-ARONOVITZ, Order of Remand and Denial of Motion to Dismiss at 9-10.

Absent the Bankruptcy Judge's articulation of findings relevant to those factors, the district court is incapable of adequately reviewing his ruling based thereon. *See Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206 (5th Cir. 1983).

Because the factual basis for Judge Britton's ruling is not present in the record before this Court, remand is appropriate. The factual predicates set forth by Judge Britton in his orders on remand from the appeals before Judge Aronovitz and Atkins afforded an adequate basis for district court review in those cases. However, the issues there involved parties and aspects of substantive consolidation and equitable subordination which differ from those before the Court in the present appeal. Accordingly, the respective findings on remand in the related appeals do not necessarily apply to the instant HTC/HLC claim.

Some findings on remand from Judge Atkins dealing with the A and B leases—for instance, those regarding misconduct by Gould which, under Florida law, is ascribable to Gould-affiliated companies—may well apply to HTC/HLC. However, not all of Judge Britton's findings as to the relevant factors pertain to the instant appellants. Without the benefit of such particularized find-

ings, this Court simply cannot determine the merits of HTC/HLC's appeal.

Certainly, "a trial judge is not held to any formalistic style in preserving his findings." *Holywell Corp., et al. v. The Bank of New York*, Case No. 85-3225-CIV-ARONOVITZ, Order of Remand and Denial of Motion to Dismiss at 11. On remand, however, the Bankruptcy Judge should clarify the meaning of his reference to "subsequent events" and make explicit findings of fact to support his conclusion that the amount required to cure the defaults on the C and D leases need not be determined.

Conclusion

Based on the foregoing, it is hereby Ordered and Adjudged as follows:

1. The Bankruptcy Court's ruling in his Memorandum Decision of September 27, 1985 that the Category C and D leases are true ones is AFFIRMED.

2. HTC's appeal is REMANDED to the United States Bankruptcy Court for the Southern district of Florida, for the purpose of the Bankruptcy Court's holding further adversarial hearings and entering such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to resolve the present appeal. This should be accomplished within thirty (30) days from the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of April, 1987.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

copies furnished to:

Vance E. Salter, Esq.
Scott D. Sheftall, Esq.
Thomas F. Noone, Esq.

APPENDIX 17

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

Adv. No. 85-0160-BKC-TCB-A

THE BANK OF NEW YORK, a New York banking corporation,
Plaintiff,

vs.

THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and a general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation,
Defendants.

JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§ 157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal

property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $17,320.16). Any change in the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20 day of March, 1985.

/s/ Thomas C. Britton
United States
Bankruptcy Judge

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

APPENDIX 18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 86-0848-CIV-Ryskamp

HOLYWELL CORPORATION, and THEODORE B. GOULD,
Debtor/Appellants,
v.
THE BANK OF NEW YORK AND FRED STANTON SMITH,
AS LIQUIDATING TRUSTEE,
Appellees.

ORDER AFFIRMING DECISION OF THE BANKRUPTCY COURT

[Filed Feb. 20, 1987]

THIS CAUSE is before the court on appeal from a final order entered by the United States Bankruptcy Court for the Southern District of Florida.

I. *Parties and Facts*

The appellants are two of five debtors involved in chapter eleven bankruptcy proceedings in the bankruptcy court below.[1] These proceedings were apparently precipitated by the inadequate financing of a construction project called the "Miami Center Project", which the debtors had attempted to finance in part through a loan from the Bank of New York (hereinafter "Bank"). Ap-

[1] The three debtors that did not appeal are Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership of which Theodore B. Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership with Gould and the Miami Center Corporation acting as general partners.

pellant and debtor, Theodore B. Gould (hereinafter "Gould"), is the sole stockholder and president of appellant/debtor Holywell Corporation (hereinafter "Holywell"), which is the parent company of Twin Development Corporation (hereinafter "Twin"). Gould is also the president and one of the directors of Twin.

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank. Approximately seven months later, Holywell and the other debtors defaulted on their obligations to the Bank resulting in the filing of bankruptcy petitions by the debtors. The debtors default entitled the Bank to the unfettered right to plenary ownership of Twin's stock. Thereafter, on October 1, 1984, Holywell and Gould moved the bankruptcy court to authorize and approve the sale of certain specified real and personal property owned by Twin and four limited partnerships, all of which are controlled by Gould and Holywell. The bankruptcy court entered an order approving and authorizing Holywell and Gould to consummate the sale of the "Washington properties".[2] Subsequently, the bankruptcy court directed Holywell to cause Twin to deposit into a segregated account, any funds payable to Twin from the sale of the Washington properties, and adjudged that the Bank had a first lien on the net proceeds owed Holywell, Gould, and Twin, from the sale of that property.

After the sale of the Washington properties, the bankruptcy court adopted the plan of reorganization submitted by the Bank. The Bank's plan consisted of the ap-

---

[2] The "Washington properties" refer to three office buildings located in the Washington, D.C., locality, which became a part of the assets of Twin, and four limited partnerships, all of which are owned by Gould and Holywell. Twin received its portion of the one hundred twelve million dollars in cash proceeds from the sale of the Washington properties, which sum is presently at issue on this appeal.

pointment of a liquidating trustee, who would be empowered to sell the Miami Center Project to the Bank, in lieu of the Bank's claims against the debtors. That plan was then affirmed on appeal by the district court in a thorough and detailed analysis by Judge Aronovitz (see case no. 85-3225-Civ-Aronovitz).

Finally, on January 28, 1986, the bankruptcy court entered an order granting the liquidating trustee, under the plan of reorganization, sole and complete authority over the Washington properties proceeds segregated in a bank account in Twin's name. This order was necessitated by Gould's contention that the liquidating trustee was without authority to effect the assets of Twin. From this order, Gould and Holywell appeal.

II. *Jurisdiction and Mootness*

The subject matter jurisdiction of this court has been invoked by the appellants pursuant to 28 U.S.C. § 158, which grants district courts of the United States jurisdiction to hear appeals from final orders of bankruptcy judges in cases brought under title eleven of the United States Code. At the threshold, the appellees urge this court to decline the exercise of jurisdiction over this appeal, for they contend this appeal is moot. The appellees stress two points relating to the mootness of this appeal: First, they contend that the appellant's neglect in procuring an order staying the implementation of the plan of reorganization, submitted by the Bank and accepted by the bankruptcy court, is fatal to this appeal; second, the appellees maintain that the plan of reorganization has been "substantially consummated", as that phrase is defined in 11 U.S.C. § 1101(2), and this appeal should be dismissed as moot, since the liquidating trustee's funds have been depleted.

Respecting the appellees first contention on mootness, this court is unwilling to apply a per se rule which demands that a party secure a stay of a bankruptcy order

to ensure its appealability. "Determinations of mootness . . . cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail". *In re AOV Industries, Inc., v. Hawley Fuel Coalmart, Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). Accordingly, the inquiry on mootness should focus on the feasibility or impossibility of effective relief to the appellants, in light of the appellees assertion that the plan of reorganization has been consummated. Although it appears that the plan of reorganization has been implemented to a large extent, and the precise portion of Twin's proceeds from the sale of the Washington properties may not be identifiable from other funds in the debtors' estates, this court nevertheless concludes that effective relief is possible. This conclusion derives from the most recent report submitted by the liquidating trustee to the bankruptcy court indicating a surplus in excess of two million dollars in the debtors' estates. If this court were to conclude that the bankruptcy court erred in ordering that the liquidating trustee be entrusted with cusody of Twin's funds, it is clear that the power to effect the surplusage in the debtors' estates would lie within this court's discretion. Consequently, this court rules that the instant appeal is not moot, and the exercise of jurisdiction over this appeal pursuant to 28 U.S.C. § 158 is proper.

III. *Standard of Review*

Appellate review of the bankruptcy court's order granting the liquidating trustee complete custody of Twin's funds is guided by two standards. First, as to findings of fact made by the bankruptcy court, they shall be affirmed unless it is demonstrated that they are clearly erroneous. Bankruptcy Rule 8013. Contrarily, the resolution of legal issues by the court below are subject to *de novo* review by this court. *See In re Matter of Butkin Bros., Inc.*, 757 F.2d 1573 (5th Cir. 1985).

IV. *Equitable Estoppel*

This court is cognizant of the equitable nature of bankruptcy jurisdiction and the pervading invocation of equitable principles in the exercise thereof. *Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966). In the instant appeal, it appears that the doctrine of equitable estoppel, a widely used equity concept in bankruptcy, as well as in other areas of the law, should be imposed against the appellant in affirming the order of the bankruptcy court below.

Essentially, equitable estoppel is a legal proposition which precludes a litigant from adhering to a position that is inconsistent with, or contradicted by, his statements, affirmative conduct, or acquiescence. The touchstone of estoppel lies in concepts of fair play and justice, *see, e.g., Schatzman v. Department of Health and Rehabilitative Services (In re King Memorial Hospital)*, 19 Bankr. 885, 891 (Bankr. S.D. Fla. 1982), although its use is circumscribed to instances where certain technical requirements are present. Gould and Holywell have taken a position through their representations and conduct which contravenes both the legal stance they now assert on appeal and the one which they argued to the bankruptcy court. But prior to deciding estoppel is apposite based on fairness notions, the requirements of that doctrine must be closely examined.

The basic elements that must be established to properly invoke estoppel entail the following: "(1) words, acts, conduct, or acquiescence, causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Dooley v. Weil (In re Matter of Garfinkle)*, 672 F.2d 1340, 1347 (11th Cir. 1982); *see also, Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969).

It is ineluctably clear that the first formal element of estoppel is present in the instant appeal. The appellants have repeatedly made representations to the effect of acknowledging that the proceeds from the Washington properties allocable to Twin would be available to creditors in satisfying claims against their estates in bankruptcy. For instance, Gould and Holywell represented to the bankruptcy court, the Bank, and numerous other creditors, that the sale of the Washington properties was

> in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale[,] which inures to Holywell and Gould[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

Debtor/Appellants' brief, pg. 3.

Further, prior to the adoption of a reorganization plan by the bankruptcy court, Holywell and Gould submitted disclosure statements and proposed a plan of reorganization. The Holywell disclosure statement made manifest to the court and creditors alike, including the Bank, that the cash proceeds derived from the sale of the Washington properties apportionable to Twin would serve as a source of funds for creditors' claims (see record, No. 466, pg. 4). Additionally, the appellants filed certificates with the bankruptcy court relating to their proposed plans of reorganization, revealing that funds in excess of fourteen million dollars, including Twin's proceeds from the Washington properties located in a segregated bank account, would be assessable to quench claims of creditors. Indeed, Gould even testified in bankruptcy court that the Twin proceeds "had to go to Holywell as dividends", thus suggesting those funds would be appropriate for the satisfaction of creditors' claims (see record, No. 385h, pgs. 49-50).

In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption

that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted "cash collateral as defined in § 363 of the Bankruptcy Code" (see debtor/appellant brief, pg. 79). Neither Gould nor Holywell took appeal from this order.

Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidatng Trust and serve as a font for permissible claims against the debtors' estates. The appellants did not enter any objections to the Bank's plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal.

In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied.

The second element of estoppel requires a finding that the party against whom the doctrine is imposed acted willfully or negligently with regard to their statements, acts,

and acquiescence. *Dooley*, 672 F.2d at 1347. There can be no doubt that Hollywell and Gould were, at the very least, negligent in not informing the Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Holywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Holywell's statement that the sale of the Washington properties would be beneficial to creditors, and Gould's testimony, that the actions of Gould and Hollywell were willful. In any event, it seems indisputable that Gould and Holywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel.

The third element of estoppel engages the court in an inquiry whether the party to whom representations have been made detrimentally relied upon the state of things as indicated by the representer. *Dooley*, 672 F.2d at 1347. For this element to be met, the Bank must have detrimentally relied on the appellants' representations and conduct. The appellants' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors, by providing a cash infusion to the debtors' estates, was relied upon by the Bank in deciding not to object to the sale of the Washington properties. Likewise, the Bank relied on Holywell's disclosure statement, the appellants' failure to complain about the Bank's plan of reorganization and the order adopting that plan, the appellants' failure to appeal an order clarifying that the Twin proceeds could be used by the liquidating trustees, and Gould's testimony, all of which suggested expressly or implicitly that Twin's share of the proceeds from the

sale of the Washington properties was available for payment to creditors.

Moreover, the Bank acted upon these statements and the appellants' conduct by distributing a large segment of Twin's funds to creditors. To countenance the legal position assumed by the appellants would cause great detriment to the Bank. The Bank would likely be held responsible for reacquiring any funds paid out of Twin's funds. The Bank's detrimental reliance upon the conduct of the appellants is therefore most patently illustrated by its authorization and distribution of Twin's funds to creditors.

V. *Conclusion*

Consequently, this court is certain that the imposition of equitable estoppel against the appellants is dictated by precepts of equity, justice and fair play, and accords with the technical elements established in *Dooley*. Gould and Holywell have taken a posture which is surely inconsistent with their express statements and conduct, which led the Bank to distribute the Twin proceeds; the Bank's detrimental reliance on the appellants' representations leads this court to the inexorable conclusion that the appellants cannot maintain their position in this court of law.

In affirming the decision of the bankruptcy court on equitable estoppel grounds, this court pretermitted any discussion of substantive consolidation. However, it is apparent to this court that the reorganization plan of the bankruptcy court did not "substantively consolidate" Twin within the meaning of that term in § 105 of the Bankruptcy Code; Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington properties, remained wholly intact under the plan of reorganization. Furthermore, assuming substantive consolidation of Twin did occur under the plan adopted by the bankruptcy court, the factors enumerated in *In re Donut Queen Ltd.*, 41 Bankr. 706, 709 (Bankr. E.D.N.Y. 1984),

would militate in favor of upholding such action by the bankruptcy court.

Therefore, after careful review and consideration of the record and the court being fully advised in the premises it is hereby;

ORDERED and ADJUDGED that the appeal from the final order of the bankruptcy court granting the liquidating trustee complete control over Twin's proceeds arising from the sale of the Washington properties is affirmed.

DONE and ORDERED at the United States District Court, Miami, Florida this 20 day of February, 1987.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Court

copies furnished to:

all counsel of record

APPENDIX 19

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5195

D.C. Docket No. 86-0848

IN RE: HOLYWELL CORPORATION and THEODORE B. GOULD,
Debtors.

HOLYWELL CORPORATION and THEODORE B. GOULD,
Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating Trustee, and
BANK OF NEW YORK,
Defendants-Appelleess.

Appeal from the United States District Court
for the Southern District of Florida

(March 18, 1988)

Before VANCE and ANDERSON, Circuit Judges, and BROWN *, Senior Circuit Judge.

---

* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous.

AFFIRMED.[1]

---

[1] The motion of appellee, Bank of New York, to dismiss the appeal as moot is DENIED.

APPENDIX 20

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC SMW
84-01594-BKC-SMW

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

Adv. Proc. No. 87-0523-BKC-SMW-A

FRED STANTON SMITH, as Liquidating Trustee
of the Miami Center Liquidating Trust,
Plaintiff,

VS.

THE BANK OF NEW YORK,
HOLYWELL CORPORATION,
MIAMI CENTER CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,
Defendants.

ORDER ON DEBTORS' "UNDERSECURITY" CLAIM

THIS ADVERSARY PROCEEDING was tried on December 8, 1987. Count III of the Complaint prays for a declaratory judgment on the Debtors' claim that The Bank of New York (the "Bank") was an undersecured

creditor and therefore not entitled to a credit for post-petition interest when the Bank purchased the Miami Center Project.

Having reviewed the pleadings, the prior findings establishing the value of the Bank's collateral and the amount of the Bank's lien, the confirmed plan, and applicable law, and having heard argument of counsel, it is hereby ORDERED AND ADJUDGED that:

1. The Bank was not an undersecured creditor in these reorganization proceedings.

2. As to Count III of the Liquidating Trustee's Complaint, judgment is therefore entered in favor of the Liquidating Trustee and the Bank, and against the claims of the Debtors.

SO ORDERED in Chambers at Miami, Florida, this 18 day of December 1987.

/s/ Sidney M. Weaver
United States Bankruptcy Judge

cc: Counsel of Record per
attached Service List

(Service to be Effected
by Mr. Salter)

APPENDIX 21

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION and THEODORE B. GOULD,

Defendants.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

Herbert Stettin, Esq.
Attorney for Trustee
1 Southeast 3rd Avenue
Suite 2215
Miami, FL 33131

Frank DeLeon, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

Robert A. Mark, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
Attorney for Debtor
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130

Theodore B. Gould
Pro Se
2564-B Ivy Road
Charlottesville, Va. 22901

Vance Salter, Esq.
Coll Davidson Carter Smith
Salter & Barkett, P.A.
Attorney for Bank of New York
3200 Miami Center
100 Chopin Plaza
Miami, FL 33131

S. Harvey Ziegler, Esq.
Attorney for Bank of New York
2000 Miami Center
100 Chopin Plaza
Miami, FL 33131

Robert Musselman, Esq.
413 Seventh Street, N.E.
P.O. Box 254
Charlottesville, Va. 22902

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTE8 LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION and THEODORE B. GOULD.

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the Complaint of the liquidating trustee of the Miami Center Liquidating Trust (the "trust") against the United

States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the preconfirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any, due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became

effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 Bankr. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the plan was substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541(a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b)(3), (b)(4), and 6151. The government supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United

States Code, or assignee . . .," under 26 U.S.C. § 6012 (b)(3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b)(4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United States Code [and payment] should be made by the fiduciary thereof." 26 U.S.C. § 6012(b)(4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b)(3), (b)(4) and *I. J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012(b)(3) and (b)(4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-69 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I. J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012(b)(3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and the government is misplaced for the Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trus-

tee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation v. United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States*, 192 F. Supp. 776 (D. Minn. 1961), affirmed, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903, 83 S.Ct. 209, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012(b)(3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012(b)(3) or a fiduciary under 26 U.S.C. § 6012 (b)(4). The liquidating trustee's duties and powers under the plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent

than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012(b)(3) or (b)(4). *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012(b)(3) and (b)(4) or elsewhere in the International Revenue Code. *Alan Wood Steel*, 7 Bankr. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012(b)(3) or (b)(4) beyond the clear import of their language. *See Greyhound Corp*, 495 F.2d 863 and *Alan Wood Steel*, 7 Bankr. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. *See* Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 Bankr. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. § 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of its powers regarding the trust. 26 U.S.C.

§ 672(a). The liquidating trustee is not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-(1a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust—its corpus and any income earned therefrom—is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors' legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner*, the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 Bankr. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner*, 53 Bankr. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue Code. *Sonner*, 52 Bankr. 859. *See also Stockton v.*

United States, 335 F. Supp. 984, 986 (C.D.Ca.1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.*, 505 F. 2d 1011, 1014 (5th Cir. 1974); *See in re Hayhall Trucking, Inc.*, 67 Bankr. 681,684 (Bankr.E.D.Mich. 1986); *See also Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697,701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr.D.Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr.W.D.Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir. 1978). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracti-

cable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

Herbert Stettin, Esq.
Attorney for Trustee
1 Southeast 3rd Avenue
Suite 2215
Miami, FL 33131

Frank DeLeon, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

Robert A. Mark, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
Attorney for Debtor
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130

Theodore B. Gould
Pro Se
2564-B Ivy Road
Charlottesville, Va. 22901

Vance Salter, Esq.
Coll Davidson Carter Smith
Salter & Barkett, P.A.
Attorney for Bank of New York
3200 Miami Center
100 Chopin Plaza
Miami, FL 33131

S. Harvey Ziegler, Esq.
Attorney for Bank of New York
2000 Miami Center
100 Chopin Plaza
Miami, FL 33131

Robert Musselman, Esq.
413 Seventh Street, N.E.
P.O. Box 254
Charlottesville, Va. 22902

APPENDIX 22

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA

Case No.: 84-01590/91/92/93/94
BKC SMW

HOLYWELL CORPORATION

Debtor

ORDER OF CERTIFICATION OF CONTEMPT

THIS CAUSE came on before the Court on January 21, 1988, upon Order Scheduling Hearing on Trustee's Motion for Contempt, dated December 22, 1987, and the Court, having considered the documents received into evidence, having heard argument of counsel, and being otherwise fully advised in the premises, makes the following findings of fact and certifications of contempt to the United States District Court for the Southern District of Florida.

1. Fred Stanton Smith is the duly appointed, qualified and acting Liquidating Trustee of the Miami Center Liquidating Trust, having been named on August 12, 1985, as provided in the Amended Consolidated Plan of Reorganization (The Plan).

2. The Plan provides in Article XIV for retention of jurisdiction by this Court after confirmation until all payments and distributions called for in the Plan have been made, and until the entry of a final decree. There are unpaid creditors remaining, and no final decree has been entered.

3. Article XIV of the Plan further provides for this Court to adjudicate all claims and controversies arising

during the pendency of the Chapter 11 cases, and for this Court to make any orders necessary or appropriate to carry out the provisions of the Plan.

4. Article V, Section 8 of the Plan states that the Liquidating Trustee shall not be liable individually for the performance of his duties as Trustee and that all liabilities of the Trustee shall only be enforceable against the Trust property.

5. In August 1987, Twin Development Corporation (Twin), a wholly owned subsidiary of Holywell Corporation, acting through Theodore B. Gould as its President, agent and sole director sued Fred Stanton Smith individually in the United States District Court for the Western District of Virginia for injunctive relief and money damages, alleging claims involving the Liquidating Trust and questions concerning the property and administration of the Trust by the Liquidating Trustee. This Court ordered Theodore B. Gould and Twin, its agents, employees and attorneys to cause the dismissal of that action without prejudice to the bringing of a proceeding before the bankruptcy court on any of the issues made.

6. Theodore B. Gould, as president of Twin, and Robert M. Musselman, as its attorney, did not cause the dismissal of that suit. Instead, acting through Theodore B. Gould and by its attorney, Robert M. Musselman, Twin filed a series of motions for dismissal of the Virginia proceeding and argued against the granting of its own motion.

7. Thereafter, on December 31, 1987, Theodore B. Gould, as president, agent and sole director of Twin, wrote to Robert M. Musselman, as its attorney representing Twin in the Virginia suit, to withdraw Twin's motion to dismiss, and to oppose dismissal of the action in direct violation of this Court's previous Orders. The Virginia action has not been dismissed.

8. On October 15, 1987, each of the debtors in these proceedings, including Theodore B. Gould and Holywell,

sued Fred Stanton Smith, both as Liquidating Trustee and individually in Dade County Circuit Court, alleging claims arising out of the administration of the Liquidating Trust and the performance of the Liquidating Trustee's duties. Robert M. Musselman and Theodore B. Gould signed the complaint.

9. By Order dated December 22, 1987, the Court scheduled a hearing on January 21, 1988, requiring Theodore B. Gould, Holywell Corporation and Robert M. Musselman to show cause why they should not be cited for contempt for these actions.

10. At the scheduled hearing, the Court heard and received evidence and argument of counsel. The following conclusions form the basis for the Court's determination that Theodore B. Gould, Holywell Corporation and its attorney Robert M. Musselman are in civil contempt of court, and should be appropriately punished by the United States District Court.

A. The Plan provides that this Court has post-confirmation authority over the debtors and the Plan assets (defined in Article V, Section 1 as "all property of the estates of the Debtors within the meaning of Section 514 (a) of the Code.) The Plan has been confirmed and that Order of Confirmation has been affirmed by the District Court. An appeal from the District Court to the Eleventh Circuit has been dismissed as moot.

B. The filing of the suits in the United States District Court in Virginia and the Circuit Court in Dade County, Florida represent deliberate attempts by Theodore B. Gould and Holywell Corporation to interfere with the orderly administration of this Court of the Plan, the assets of the Liquidating Trust and the Trustee. The deliberate refusal to obey this Court's Orders concerning dismissal of the Virginia proceeding the filing of pleadings in the Virginia suit seek to frustrate this Court's Order; and the subsequent filing of the Dade County suit

represent willful attempts to subvert the authority of this Court. The letter of December 31, 1987, written by Theodore B. Gould, acknowledges his conscious decision not to obey the Orders of this Court.

C. The conduct of Robert M. Musselman in filing the pleadings referred to above is a willful disobeyal of this Court's Orders directed to him.

D. The respondents have attempted to avoid responsibility for their actions by arguing that the Court's jurisdiction over the debtors and much of their property ended upon confirmation, and that, therefore, this Court had no authority to order the dismissal of the Virginia suit, or to punish them for filing the Dade County suit. The same arguments were made in a Petition for Mandamus and Prohibition filed by the debtors (through Robert M. Musselman) in the Eleventh Circuit. The Petition was denied by Order dated January 22, 1988.

E. The remedy of a party who disagrees with an order of this Court is by appeal to the District Court, and to seek to stay the effect of the order sought to be reviewed, if appropriate. The debtors have sought review by appeal from the Court's prior orders relating to these matters. Those appeals pend under case numbers 87-2315 CIV TCS; and 88-0373 CIV KLR. No stay remains in effect since Judge Scott vacated a temporary stay by Order dated January 4, 1988.

F. No party nor any lawyer representing a party may deliberately ignore or act in contradiction of an Order of this Court simply because they do not agree with it. Such conduct is contumacious and is punishable by contempt. The validity of the Court's authority to carry out its responsibilities depends upon obeyal of its orders until reversed or stayed pending review.

G. As punishment, the Court believes it is appropriate to fine Mr. Musselman and to fine both Mr. Gould and

Holywell Corporation, and to require a period of public service in Dade County, Florida, by Mr. Gould.

DONE AND ORDERED IN CHAMBERS, MIAMI, FLORIDA, THIS 7 DAY OF APRIL 1988.

/s/ Sidney M. Weaver
United States Bankruptcy Judge

Conformed copies:

Herbert Stettin, Esquire
Thomas F. Noone, Esquire
Robert Mark, Esquire
Theodore B. Gould
S. Harvey Ziegler, Esquire
Robert Musselman, Esquire
John W. Kozyak, Esquire
Vance Salter, Esquire

APPENDIX 23

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos.: 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of

BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is

ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

Service of this Order to be performed
by Fred H. Kent, Jr.

APPENDIX 24

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 85-3230-Civ-Atkins

OLYMPIA & YORK FLORIDA EQUITY CORP.
and MIAMI CENTER JOINT VENTURE,
Appellants,

vs

THE BANK OF NEW YORK,
Appellee.

ORDER ON APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Appellants, Olympia & York Florida Equity Corporation and Miami Center Joint Venture (O&Y/MCJV), seek a stay, pending appeal, of the confirmation Order of the Bankruptcy Court permitting the Liquidating Trustee to take title to furniture, fixtures and equipment (FF&E) of MCJV and transfer it to appellee. Appellants argue that the Bankruptcy Court committed several critical errors in the Amended Consolidated Plan of Reorganization, as modified (the "Plan"). Appellants contend that they are entitled to full payment of their $14,417,619 claim before title to the property is transferred, because the Bankruptcy Court found their leases to be "true leases." Appellants also urge that the Bankruptcy Court lacked any proof of or a foundation for declassification and subordination of appellants' claim on the basis that O&Y and MCJV were "insiders" as to debtor Gould.

The granting of a stay pending appeal of an order of the Bankruptcy Court is discretionary. *In re Rhoten*, 31

B.R. 572 (M.D. Tenn. 1982); *In re Neisner Brothers, Inc.*, 10 B.R. 299 (Bkrtcy. S.D.N.Y. 1981). Four criteria must be met to obtain a stay pending appeal:

(1) The applicant must establish a strong likelihood of success on the merits;

(2) The applicant must show that he will be irreparably harmed if the stay is not granted;

(3) The applicant must show that the other party will not be irreparably harmed by a stay; and

(4) The applicant must show that the public interest will be served by the stay.

J.L. v. Parham, 412 F. Supp. 141, 142 (M.D. Ga. 1976); *See In re Tenpins Bowling, Ltd.*, 32 B.R. 474, 483 (Bkrtcy., M.D. Ga. 1983). Appellants have not established these elements, because they will not suffer irreparable injury if they do not obtain the stay.

Appellants' argument concerning the likelihood of success on the merits is compelling. However, the Bank has attempted to secure appellants' interest by providing for a "Trustee's Certificate." This Certificate provided for the appellee to advance to the Trustee up to the full amount of the claim, within 10 days after written request by the Trustee, less certain reductions. In response, appellants argue that this Certificate will not provide sufficient protection. The court agrees that the conditions of the Certificate fail to preserve and protect appellants' interets. Therefore, to provide sufficient protection for appellants, the court ORDERS that appellee shall file a corporate surety bond in the amount of $15,000,000 on or before the close of business on October 10, 1985. The bond shall be conditioned to pay the amount of the appellants' claim as allowed by the Bankruptcy Court, plus interest, damages for delay, and costs in the event of reversal of this appeal. In this manner,

appellants' interests will be fully protected and they will not face any risk of irreparable damage.

It is further ORDERED that:

1. The appellants shall file and serve appellants' brief within fifteen (15) days of this order.

2. The appellee shall file and serve its brief within fifteen (15) days of the date that appellants' brief is received by counsel for appellee.

3. This appeal is set for oral argument at 8:30 a.m., Friday, November 22, 1985, in Courtroom 4, Federal Courthouse Square, 301 North Miami Avenue, Miami, Florida. Each side is allocated 30 minutes for argument.

DONE AND ORDERED at Miami, Florida, this 4 day of October, 1985.

/s/ C. Clyde Atkins
United States District Judge

cc: Emmet Marvin & Martin
Therrel Baisden & Meyer Weiss
Steel Hector & Davis
Floyd Pearson, et al
John W. Kozyak, Esquire
Albert I. Edelman, Esquire

APPENDIX 25

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

JUDGE THOMAS C. BRITTON

No. 84-01590

IN THE MATTER OF

HOLYWELL CORPORATION,

Debtor.

MOTION FOR SUBSTANTIVE CONSOLIDATION

July 18, 1985

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Thursday, July 18, 1985, and the following proceedings were had:

* * * *

[21] LOUIS FERGUSON

was called as a witness by the Debtors and, having been first duly sworn, was examined and testified as follows:

[22] DIRECT EXAMINATION

BY MR. KENT:

Q Would you state your name and address, please?
A My name is Louis Ferguson. My address is 5525 Partridge Lane Northwest, Washington, D.C.

Q What is your occupation?

A I am an attorney.

Q And with whom do you practice and where?

A I am a partner in the law firm of Williams & Connolly in Washington, D.C.

Q Are you familiar, sir, with Miami Center Limited Partnership?

A Yes, I am.

Q In what respect?

A I am familiar with it in that I drafted the partnership agreement, I drafted a substantial part of the private placement memorandum and, through a District of Columbia general partnership, I am an investor in Miami Center Limited Partnership.

Q All right, sir. First, let's go to your capacity as a draftsman.

Under the Miami Center Limited Partnership agreement, sir, could you explain to the Court the control of that partnership itself?

[23] THE COURT: Let me ask: Would not the document speak for itself? What is the necessity—

MR. KENT: It might speak for itself, your Honor, but it is very confusing and it gets into the tax aspect which I am not familiar with, I know it would help a great deal to have this explained to me.

THE COURT: How long will Mr. Ferguson be speaking?

MR. KENT: About five minutes, at the longest.

THE COURT: All right, that will be the last witness that we will have before I have to recess for a while, I am afraid.

MR. KENT: All right, sir.

THE COURT: Go ahead.

A The operation of this partnership is rather complicated. In terms of the day-to-day operations, Mr. Gould, or the general partners, Mr. Gould and Miami Center Corporation, have, as they must have, day-to-day control of the operations of the partnership.

There are three aspects, however, where Mr. Gould does not have control over the operations of the partnership and this is where he is subject to veto by the limited partners. That is with respect to [24] any sale or disposition of all of the assets of the partnership, with respect to his own resignation from the partnership, and it with respect to a right of removal of the general partner by outside limited partners. The outside limited partners have the right both to prevent Mr. Gould from resigning as a general partner and to remove him with or without cause.

Q (By Mr. Kent) Suppose if they elect to do so, then what alternatives does Mr. Gould have, under those circumstances?

A If they elect to remove him as a general partner, certain steps have to be taken, for example, tax opinions have to be given that it doesn't destroy the tax capacity of the limited partnership and, at that point, Mr. Gould ceases to be a partner in the partnership, although he continues to have an economic interest.

MR. ZIEGLER: Your Honor, I hate to interrupt a witness, but all this man is doing is paraphrasing an agreement to your Honor which your Honor is capable of reading and making a determination. His paraphrasing of it is not going to change any of the facts of the contents of the document, and we object to his further—

THE COURT: I am going to overrule the [25] objection. I am going to give Mr. Kent latitude here, althought this does seem to be duplicative and I have no intention, by overruling this objection, to depart at all from the parol evidence rule.

Go ahead, Mr. Kent.

Q (By Mr. Kent) I hand you a document, Mr. Ferguson. Are you familiar with that?

A. I am. This is Agreement of Limited Partnership of Miami Center Limited Partnership.

MR. KENT: Your Honor, I offer this in evidence.

THE COURT: The document is not now in the record anywhere?

MR. KENT: No, your Honor, I do not believe so.

THE COURT: I will receive the document as Debtor's Exhibit A, unless I hear and objection.

MR. ZIEGLER: No objection to the document.

(Thereupon, the foregoing instrument was marked as Debtor's Exhibit A in evidence.)

Q (By Mr. Kent) Let me ask you this, Mr. Ferguson: Are not these removal provisions unusual for a limited partnership agreement?

[26] A In my experience. they are unusual.

Q And would you explain why they are in the agreement because, to my recollection, I recall the discussion specifically—

MR. ZIEGLER: Objection, your Honor.

THE COURT: Okay, let me hear the objection.

MR. ZIEGLER: He is speculating at this point on what would be the content of the minds of other people as to the reason why they were in. He is, if I understand Mr. Kent correctly at this moment, he is testifying as a draftsman. If he wants to testify later in his capacity as a single investor as to the product of his own mind, that would be the only possibility, but right now he is trying to summarize the intent of a large group of people as to what they wanted this agreement to mean and—

THE COURT: Mr. Kent, I am going to overrule the objection. I will allow you to put the evidence in, but, in doing so, let me give this caution: If, after I have heard this entire record, I reach the conclusion that there is no ambiguity in this document that would justify the consideration of testimony as to the intent of the drafter or the [27] intent of the parties to the document through parol testimony, I will completely disregard his testimony.

MR. KENT: I believe you will find, your Honor, that, like so often happens, Mr. Ferguson was in this capacity as scriviner rather than the one doing the work.

Q (By Mr. Kent) Let me repeat my question: Why were these unusual, what you referred to as unusual provisions in this document as to removal, Mr. Ferguson?

A A number of the investors in this partnership were very sophisticated, wealthy people who were represented by knowledgeable counsel who insisted specifically—there is a New York family that put $2 million into this project—who insisted that these provisions be put in there. They were not in the original drafts.

THE COURT: Is that all you need from him?

MR. KENT: Yes, your Honor.

THE COURT: Cross examination?

MR. ZIEGLER: No questions, your Honor.

THE COURT: Okay. Thank you very much, Mr. Ferguson.

THE WITNESS: Thank you, your Honor.

* * * *

[30] CRAIG TOLL

was called as a witness by the Debtors and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENT:

Q Would you state your name, please?

A Craig Toll.

Q What is your address, Mr. Toll?

A 1400 North 41st Court, Hollywood.

Q What is your occupation?

[31] A I am a certified public accountant.

Q By whom are you employed?

A Touche Ross & Co.

Q You have testified prior in the proceedings involving this estate, have you not?

A Yes, I have.

Q Mr. Toll, are you familiar with the financial statements, the audited financial statements of Holywell and Miami Center Limited Partnership made by Touche Ross over the last two or three years?

A Yes, I am.

Q How about the tax returns filed by those entities over the last two or three years?

A Touche Ross prepared the tax return for the Miami Center Limited Partnership for the year ended December 31, 1983. That is the only participation that Touche Ross has had with the tax return preparation.

Q How about for '84, are you working on those at this time?

A Yes, we are presently on the tax returns for both entities for 1984.

Q I have several questions to ask you, Mr. Toll: First of all, as to the tax returns that you are now working on for 1984, will this be a consolidated tax return for Miami Center Limited [32] Partnership and Holywell Corporation?

A No, it will not be.

Q How about your previous work done on the tax returns for Miami Center Limited Partnership—

A Yes, Miami Center—

Q —was that a consolidated tax return with Holywell Corporation?

A No, it was not.

Q On the audits of the financial statements that Touche Ross has done, how far back to they go, if you will?

A 1981, December 31, 1981.

Q At any time has Touche Ross been requested to prepare a consolidated financial statement cosolidating Miami Center Limited Partnership and Holywell Corporation?

A No, we have not.

Q In the preparation of these tax returns and the auditing of the financial statements, was there any dif-

ficulty in segregating or allocating, if you will, the assets of Holywell Corporation and Miami Center Limited Partnership?

A No, we had no difficulty in identifying the assets.

Q Do these statements reflect separate [33] assets for the two entities?

A Yes, they do.

Q On inter-company transactions, Mr. Toll, I assume there were inter-company transactions between Holywell and Miami Center Limited Partnership?

A Yes, there were.

Q As to the loans, sir, are all the loans going back and forth between these corporations documented?

A To the best of my knowledge, all of the loans have notes.

Q Are these reflected in the audited financial statements?

A They are shown on the audited financial statements as advances.

Q I am talking about loans now.

A They are called advances in the audited financial statements—

Q I see.

A —but they are documented by notes.

Q Are these interest-bearing notes, to your knowledge?

A Yes, they are.

Q If you know, are Holywell and Miami Center Limited Partnership on the same fiscal or [34] calendar year, or are they both on a calendar year?

A Holywell Corporation, for tax purposes, is on a fiscal year of July 31st, while the partnership is on a December 31st calendar year.

THE COURT: Which entity is on the calendar year?

THE WITNESS: Miami Center Limited Partnership.

Q (By Mr. Kent) One final question: In examining and auditing the financial statements, was there a practice to keep these two entities, Miami Center Limited

Partnership and Holywell, were they dealing each with the other as separate entities?

A Yes, they were. Each one had its own books and records and dealt with each other in the normal course of business.

MR. KENT: Thank you. That is all I have, your Honor.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. ZIEGLER:

* * * *

[44] Q Did you do all of the accounting work over this period of time for the Holywell Corporation?

A What period of time?

Q '80 to '83.

A We did the audits of Holywell Corporation and subsidiaries from 1981 and we are working on 1984.

Q Who did the tax return for—

A Another firm in Washington did the tax returns of Holywell for all of those years.

* * * *

[48] EDGAR SCHUMACHER, JR.

was called as a witness by the Debtors and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENT:

Q Would you state your name and address, please?

A Edgar Schumacher, Jr. I reside at 1955 Waybridge Lane, Reston, Virginia.

Q And what is your occupation, Mr. Schumacher?

[49] A Chief financial officer for Holywell Corporation.

Q And, as such, are you also a certified public accountant?

A Yes, I am.

Q What are your duties as chief financial officer for Holywell Corporation?

A I oversee the financial and accounting functions for the corporation and its wholly owned subsidiaries.

Q Do you now perform any services for Miami Center Limited Partnership?

A Yes, I do. As of January of '85, after the sale of our Washington properties and their closing, I have pretty much been down here on a full-time basis, assisting in the operations of the Miami Center project.

Q Have you since become familiar with the financial statements and tax returns of Miami Center Partnership?

A I have some familiarity with them, yes.

Q And you, of course, are familiar with the Holywell financial statements and corporate tax returns?

A Yes, I am.

[50] Q Are you also or have you since become familiar with the normal business of Miami Center Limited Partnership?

A Yes.

Q Does Holywell still maintain an office?

A Yes, it does.

Q And where is that?

A The office had been in Roslyn, Virginia, until basically as of last week when our lease was up and we set up a new office in Charlottesville, Virginia.

Q Does Holywell or any of its subsidiaries still continue in business?

A Holywell Corporation does, a couple of the Washington subsidiaries are still in operation, they have some receivables and payables to handle, and all the Miami based subsidiaries are still in operation.

Q For our time frame, unless I state otherwise, sir, let's back to August of 1984—

A Right.

Q —immediately prior to the filing of these proceedings. At any time, to your knowledge, going back to the beginning of these two entities, Holywell and Miami Center Limited Partnership, have [51] they ever, to your knowledge, filed a consolidated financial statement either for internal purposes or for getting loans or anything?

A No. Every entity has always been treated as a separate entity.

Q How about tax returns, have they ever filed consolidated tax returns, Miami Center Limited Partnership and Holywell Corporation?

A They never have.

Q Are you familiar with the Miami Center Limited Partnership partnership agreement?

A I have some familiarity with it, yes.

Q Under that agreement, sir, who were the general partners?

A Theodore B. Gould and Miami Center Corporation.

Q And what is the percentage of the general partners at this time or, better still, on August 22, 1984?

A The profit sharing and loss percentages, as of that time and now, was one percent for the general partners as a group and 99 percent for the limited partners.

Q So, the two general partners together would have one percent; is that correct?

[52] A Of the profits and losses of the partnership as of that point in time.

Q All right, sir. What interest, if any, did Holywell Corporation have in Miami Center Limited Partnership?

A Holywell Corporation owned ten units of the 40 units, 10½, excuse me, of the 40 units of limited partnership.

Q And how about Mr. Gould, what did he own?

A Mr. Gould owned five units of the 40.

Q So, what was the total ownership, limited partnership ownership of Mr. Gould and Holywell together in Miami Center Limited Partnership?

A They would have 15, say, 16 out of the 40 units of the 99 percent, substantially less than 50 percent.

Q Now, Miami Center Corporation, which is a general partner, is that a wholly owned subsidiary or is that wholly owned by Mr. Gould?

A The Miami Center Corporation is a subsidiary of Holywell Corporation, and Holywell Corporation holds 100 percent of the shares, but 20 percent of the shares are being held as a nominee for another investor, Mr. Andrew Kalman, K-a-l-m-a-n.

[53] Q So, actually they only own 80 percent; is that correct?

A Correct.

Q Now, can you explain to the Court what is the business that Holywell is in?

A Since its formation in 1976 Holywell's business has been the development, management and servicing of real estate assets.

Q Now, we are talking about consolidation here today between Miami Center Limited Partnership—as Holywell performed these same services for other limited partnerships or other entities?

A Yes, and most of the other real estate assets we have developed, we have had subsidiary service companies providing a similar range of services to those respective properties.

Q As of the date of filing, August 22nd of '84, how many other limited partnerships or entities were being served or serviced by Holywell other than Miami Center Limited Partnership?

A As of that time, there were four other properties in the Washington area, three limited partnerships and one office building, a separate building that we previously sold that we were still providing services to.

[54] Q And are the services being provided to those office buildings similar to the services being provided by Holywell to Miami Center Limited Partnership?

A Those services are of a very similar nature, yes.

Q Now, counsel has mentioned, if you have been sitting here and heard, a guarantee by Holywell of the Miami Center Limited Partnership Mortgage to the Bank of New York.

A Yes.

Q Did Holywell guarantee all of that mortgage?

A No. My understanding is that the Holywell Corporation has only guaranteed the Bank of New York debt that is in excess of the first $89,500,000 construction loan, the reason being for that is the $89,500,000 was a non-recourse debt, so we could take advantage of the tax laws related to the pass through of losses to private investors.

Q Now, is this unusual for Holywell to guarantee mortgages of limited partnerships with which it is doing business?

A No, we have had to do that several times in the past.

[55] Q When you say "several times in the past," specifically what was that?

A The 1300 North 17th Street Associates Partnership, 1333 New Hampshire Associates, Great Western Bank Building Limited Partnership and others.

Q Now, as to the loans between Holywell and Miami Center Limited Partnership, are these loans documented?

A Yes, they are.

Q And do they bear interest?

A They do.

Q Are these loans, to your knowledge, reflected in the financial statements of Miami Center Limited Partnership and Holywell Corporation?

A Yes, sir, to the best of my knowledge.

Q What is the nature of—I have asked you about Holywell—of Miami Center Limited Partnership's actual business?

A Miami Center Partnership is the leasehold owner of the Miami Center project.

Q Does it perform any of these services for its own benefit?

A It is basically a passive owner.

Q Now, sir, in your experience over the [56] last few years, has Holywell and Miami Center Limited Partnership at any time, to your knowledge, co-mingled any assets or liabilities?

A No, none whatsoever, to my knowledge.

Q And I am talking now of going back to August 22, 1984 back to the formation of those companies.

A No.

Q If, in fact, any funds are advanced by one company to the other, are these recorded on the books of the two companies?

A We have always treated transactions, recorded all transactions between the companies separately in each set of books, and if there were actual cash advances, we would document those with promissory notes.

Q Would there be any difficulty or has there ever been any difficulty in segregating or tagging or allocating the assets of Holywell Corporation, on the one hand, and Miami Center Limited Partnership on the other?

A No. From day one we have always treated them, as we have in our other partnerships, as completely separate entities and kept its own records and identifications.

[57] Q How about liabilities?

A The same for liabilities.

Q To your knowledge, sir, would there be any benefit to Holywell Corporation of combining its office down here in Miami with Miami Center Limited Partnership?

A No specific benefit other than simply being near the area where you have a significant project.

MR. KENT: That is all I have, your Honor.

* * * *

[84] THE COURT: Mr. Kent, I am gathering, from what I am hearing here, that the tie, the link, the predicate for the assertion that the assets of Holywell properly are subject to the claims of the other entities is the link through Gould. If Gould, in fact, controls, and I

assume that the word "controls" also is "owns," I mean "owns and controls," has the power to dispose of the assets of Holywell and if he simultaneously, in the same capacity, is indebted to these other entities, isn't that the same thing as saying that Holywell is indebted to those others? Is that your contention, Mr. Ziegler?

MR. ZIEGLER: Yes, sir, because by the full ownership of Holywell Corporation, so that he is entitled to everything that Holywell owns and nobody else is entitled to any part of it, he has got to throw the Holywell assets into the overall bankruptcy pot which is why, in a fit of frustration and no other way [85] to do it because we were trying to unwire the wire diagram, that we used substantive consolidation as the device.

THE COURT: Well, just say yes, and—

MR. ZIEGLER: Yes.

* * * *

[96] THE COURT: Gentlemen, sooner or later I have to make a decision and this is not an easy point for me and perhaps prudence ought to dictate that I ought to take it under advisement and spend a month until I can get the time to stundy your memoranda very, very carefully and explore it back and forth. I am not going to do all that.

Instead, I am going to buy the argument of the bank. I am going to approve the proposal which, for want of a better term, is labeled substantive consolidation, I am going to approve the sitpulation that has been made. I recognize that what we have just talked about, and I think all of us recognize, is not substantive consolidation in the typical or classical sense, it is something different, but whatever it is, as presented in the bank's plan, I am going to approve it and I am going to approve it with the understanding that it is an equitable doctrine, it is something created by courts in an effort to minimize [97] the hurt to the affected parties and to facilitate the court's effort to dispense justice to those parties.

In this instance, the alternative would appear to be an unnecessarily circuitous time-consuming and expensive exercise that might conceivably lead to the diversion of some assets which under the principles of law, as I understand them, ought to be available for the satisfaction of these obligations.

Now, I am very sensitive to Mr. Kent's point, and I think Mr. Ziegler has indicated that he is equally sensitive to it, that there is no necessity of destroying more than is necessary to satisfy the obligations. Therefore, the entities, the debtor entities that we are talking about, would not be demolished or destroyed. They would remain available for any purpose that Mr. Gould wishes to put them to after we are though, and here I am talking as though the plan is confirmed. Please understand, gentlemen, we haven't reached that point, there are other bridges, I take it, that need to be crossed before that point can be reached, and maybe this will turn out to be an idle exercise all around, I don't know, but as we have indicated before, we have got to take a step at a time and this particular step, I think, ought to be taken today. [98] Secondly, if there is a marshalling aspect to this case, if it should develop as we move forward where the marshalling of the assets to meet liabilities ought to be conducted against particular assets ahead of other assets for the convenience and the survival of the debtors or Mr. Gould's personal interest, I think that that is a matter that ought to be considered if and when the problem comes up, and I don't want to exclude that possibility.

The last point I want to touch on are the tax consequences. In this area I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision that we are talking about right at the moment.

If a modification of this plan or any other adjustment can be made to alleviate adverse tax consequences for the debtors, then I think that a request for such a modifica-

tion ought to be respected and honored and I would, so long as I have the discretion to do so, intend to accomplish that result and I don't mean to foreclose it today. I think all of us have recognized in our discussion this morning that there might be tax consequences, we are not certain if we have considered all that we could do [99] to alleviate the adverse tax consequences, and if somebody will bring them to our attention, through you, I imagine, Mr. Kent, we would want to reconsider that, but on the basic question of whether or not I should doom the bank's plan in its present form by just saying that there is no legal predicate here and no justification for me to allow the version of consolidation that is embodied in that plan, I am not willing to take that step today and I am willing to go along with the approach the bank has offered.

* * * *

APPENDIX 26

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B. R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better. The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The

debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditors' committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits,

briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this

issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetiiton here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29. (C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon an May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under,

and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX 27

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER APPOINTING TRUSTEE

On August 8, 1985 the Court entered an order confirming the Amended Consolidated Plan of Reorganization proposed by The Bank of New York (the "Bank's Plan"). Article V of the Plan contemplates the establishment of a liquidating trust and the appointment of a Trustee for all property of the debtors.

The Bank of New York has nominated Fred Stanton Smith to serve as Trustee under the Bank's Plan. In accordance with the discussions among counsel in open Court on August 8, Mr. Smith has been introduced to counsel for the debtors and Olympia & York.

In the interest of assuring an orderly transition from the debtors-in-possession to the Trustee, it is hereby ORDERED that:

1. Fred Stanton Smith is hereby appointed as Trustee for purposes of the Bank's Plan.

2. Since motions for rehearing are anticipated and will not be heard until next month, for the time being:

(a) the Trustee's compensation and expenses shall be borne by the Bank;

(b) The Trustee shall not assume title to, and possession and control of the debtors' property and affairs as contemplated by the Bank's Plan until such time, if any, as the motions for rehearing on the confirmation order have been heard and determined; in the interim, the Trustee and his representatives shall have the power and right:

(1) Upon notice to the debtors-in-possession, to enter upon and inspect the debtors' premises in order to become familiar with debtors' operations, including, without limitation, the Miami Center buildings and operations;

(2) Review and copy all books and records of the debtors and their respective subsidiaries, including all records, relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data;

(3) Discuss the affairs and business operations of the debtors and their respective subsidiaries with the officers, directors, employees, attorneys, accountants, agents, tenants, subtenants, of such entities in order to gain a thorough understanding of such affairs and operations; and

(4) Engage attorneys, accountants, and such further consultants as he may deem appropriate, providing notice of such retention to parties in interest, for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries.

3. On or before the date the Trustee assumes possession and control of the debtors' property and affairs pursuant to the Plan, the Trustee shall:

(a) File with the Court and serve upon all parties in interest a written statement describing the proposed basis

for his compensation as Trustee and the identity of, and proposed compensation for, such attorneys, accountants, and consultants as have been retained by him. No compensation shall be payable to the Trustee or to any such attorney, accountant, or consultant from the assets of the debtors' estates until the Court has reviewed and heard any objections to such proposed compensation arrangements.

(b) Post a Trustee's bond in the amount of $1,000,000.00 in form approved by the Court. All payments of claims by the Trustee shall be approved by Court order.

DONE AND ORDERED at Miami, Florida, this 12 day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: Counsel and Parties per
Attached Service List

SERVICE LIST

Daniel Lampert, Esq.
Morgan, Lewis & Bockius
3200 Miami Center
100 Chopin Plaza
Miami, Florida 33131

Fred H. Kent, Jr., Esq.
Kent, Watts, Durden, Kent,
Nichols & Mickler
850 Edward Ball Building
P.O. Box 4700
Jacksonville, Florida 32201

S. Harvey Ziegler, Esq.
Meyer, Weiss, Rose, Arkin, Shampanier
Ziegler & Barash, P. A.
407 Lincoln Road
Miami Beach, Florida 33139

Thomas F. Noone, Esq.
Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue
Miami, Florida 33131

William C. Crenshaw, Esq.
Valdes-Fauli, Cobb & Petrey, P. A.
1401 AmeriFirst Bldg.
One Southeast Third Ave.
Miami, Florida 33131

William E. Sadowski, Esq.
Akerman, Senterfitt & Eidson
405 Brickell Concours
1401 Brickell Avenue
Miami, Floirda 33131

Barry J. Dichter, Esq.
Cadwalader, Wickersham & Taft
100 Miaden Lane
New York, New York 10038

Radis Organization
230 Park Avenue
New York, New York 10017

Hestor, Roth & Calloway
2961 A. Chain Bridge Road
Oakton, Virginia 22124

Xerox Computer Services
P.O. Box 92755
Chicago, Illinois 60675

Pavillon Hotel
100 Chopin Plaza
Miami, Florida 33131

Morris, James, Hitchens & Williams
P.O. Box 2306
Wilmington, Delaware 19899

Mary Snyder & Associates
927 15th Street, N.W.
Washington, D.C. 20005

Eleven duPont Circle Associates
1300 N. 17th Street
Arlington, Virginia 22209

Accountemps
Suite 401
7316 Wisconsin Avenue
Washington, D.C. 20014

Finley, Kumble & Wagner
425 Park Avenue
New York, New York 10022

James L. Brown
219 S. Barrington, No. 2
Los Angeles, Calif. 90049

Helft World Travel
P.O. Box 99
Vienna, Virginia 22180

Hank Meyer & Associates
2990 Biscayne Blvd.
Miami, Florida 33137

Mr. Rich Rogers
Scientific Atlanta
One Technology Parkway
P.O. Box 105600
Atlanta, Georgia 30348

Laborers of Dade County
Escrow Agent
P.O. Box 1104-Kendall Branch
Miami, Florida 33156

Mr. Ludovico de Santilana
Venini International
Fondamenta Vetrai 50
10121 Murano
Venezia, Italia

Richard Touby, Esquire
AmeriFirst Federal Bldg.
2nd Floor East
100 Northeast 1st Avenue
P.O. Box 015181
Flagler Station
Miami, Florida 33101

Com Corps., Inc.
711 Fourth Street, N.W.
Washington, D.C. 20001

Mr. Sukeforth
Sasaki Associates
44 Pleasant Street
Watertown, Mass. 02172

Mr. Lesle Lipscomb, Jr.
Kemper Group
1610 Forest Avenue
Richmond, Virginia 23288

Oser, Kaler, Grimes & Shriver
710 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036

Nelson, Connolly & Belson
39 Broadway
New York, New York 10006

Thomas L. Ford, Esq.
5555 S. W. 94th Court
Miami, Florida 33165

James F. Asher, Esquire
Kimbrell, Hamann, Jennings,
Womack, Carlson & Kniskern, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131

Ronald S. Golub, Esquire
3510 Biscayne Boulevard
Miami, Florida 33137

Gerald L. Solomon, Esquire
Leiby and Elder
17131 N.E. 6th Avenue
Miami, Florida 33162

Scott D. Sheftall, Esq.
Floyd Pearson Richman Greer Weil
Zack & Brumbaugh, P.A.
One Biscayne Tower, 25th Floor
Miami, Florida 33131

APPENDIX 28

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

No. 84-01590

IN THE MATTER OF HOLYWELL CORPORATION, *et al.*,
Debtors.

HEARING ON REMAND

January 18, 1986

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Saturday, January 18, 1986, and the following proceedings were had:

APPEARANCES:

WILLIAMS & CONNOLLY, by
RAYMOND W. BERGAN, Esquire, and
PHILIP J. WARD, Esquire,

and

KENT, WATTS & DURDEN, by
FRED H. KENT, JR., Esquire,
Attorneys for the Debtors.

MEYER, WEISS, ROSE, ARKIN, SHAMPANIER, ZIEGLER & BARASH, P.A., by
S. HARVY ZIEGLER, Esquire,

and

STEEL, HECTOR & DAVIS, by
VANCE E. SALTER, Esquire, and
FRANCIS L. CARTER, Esquire

and

EMMET, MARVIN & MARTIN, by
THOMAS F. NOONE, Esquire,
Attorneys for the Bank of New York.

PARKER, CHAPIN, FLATTAU & KLIMPL, by
ALBERT I. EDELMAN, Esquire,

and

KOZYAK, TROPIN & THROCKMORTON, by
JOHN W. KOZYAK, Esquire,
Attorneys for Olympia & New York Florida Equity Corp. and O&Y Equity Corp.

* * * *

INDEX

Witness	Direct	Cross	Redirect	Recross
Debtors:				
Donald Anderson Denkhaus				
—By Mr. Bergan	9		30	
—By Mr. Ziegler		17		30
Edgar Schumacher, Jr.				
—By Mr. Bergan	40		—	
—By Mr. Ziegler		46		—
Craig Stanley Toll				
—By Mr. Bergan	55		61	
—By Mr. Ziegler		59		—
Clinton M. Hamilton				
—By Mr. Bergan	62		84	
—By Mr. Ziegler		71		—
Bank of New York:				
Herbert Stettin				
—By Mr. Salter	32		38	
—By Mr. Bergan		37		39
Charles V. Failla				
—By Mr. Salter	86		—	
—By Mr. Bergan		92		—

Exhibits	Page
Plaintiff's Exhibit No. 1	29
Defendant's Exhibit A	21
" " B	28
" " C	105
" " D	105

* * * *

THE COURT: Turning to business, let me try to frame the context that we are in today and ask the help of counsel to correct me, please, if I am mistaken.

By his order of December 30th, Judge Aronovitz of the District Court has remanded this matter here, with certain specific instructions which I won't try to repeat other than to mention that he makes the statement at Page 11, "At the very least, the Bankruptcy Court should require each party to list in writing any further evidentiary hearings they deem to be necessary. The Bankruptcy Judge can then review these requests to determine and then hold evidentiary hearings on any such requests he may deem such hearings to be appropriate."

Now, in attempted compliance with that directive, a status conference was held a few days back. Counsel, as I understood it, agreed that setting aside a-half-a-day ought to enable the appellants to present such additional evidence as they think ought to be a part of this record before we attempt to frame the specific findings of fact that Judge Aronovitz has directed.

The appellee, the Bank of New York, I take it, has in written form stated its position that no further evidentiary hearings are even necessary or appropriate.

I orally ruled at the status conference that the evidentiary hearings would be held and the appellants would be afforded an opportunity to, at the very least, proffer all evidence that they consider to be material. The Court will reserve any ruling as to whether that evidence is to be treated as a proffer and then rejected, whether that evidence should be treated as evidence received to supplement the record that existed at the time the confirmation order and the consolidation order were entered. Those are the two orders that I understand are on appeal.

Now, let me pause at this moment and ask the two parties, if I can: Have I gotten off the track yet? Mr. Salter?

MR. SALTER: No, sir.

THE COURT: Mr. Bergan?

MR. BERGAN: Not so far as we are concerned, your Honor.

THE COURT: Okay.

MR. SALTER: The only thing we would add to that, your Honor, is that to the extent that they put on evidence, let's say, as to valuation, we would ask for an opportunity to meet that with our own appraiser.

THE COURT: Yes. Mr. Salter made a similar request at our status conference and, at that time, I indicated, of course, that is appropriate, and I would take it that, in doing so, it would not be insisted that this is a waiver or an abandonment of a position that may or may not be asserted later.

On further comment before we begin: The procedure that I have just indicated and the ruling I have just restated is, of course, based upon a desire to put together a record which would simplify the task for reviewing courts as much as is possible.

I propose to make decisions, but I do not want those decisions to be in such a form that, should it be determined that my decision was inappropriate, that the matter must again come back for further testimony or another go at it.

Therefore, consistent with that approach, my rulings on objections to evidence this moring will tend to be generous, let's put it that way, will tend to be generous to the proponent of the evidence and, in doing so, gentlemen, let me make the cautionary statement now that this Court reserves the prerogative, upon reflection after the close of the hearing, in preparing its detailed findings, to reject or disregard any evidence, although allowed to be presented today, which may, in this Court's judgment, later be determined to be either totally irrelevant, inadmissible for one reason or another or utterly lacking in evidentiary persuasiveness on any point material to the Court.

So, I want to allow the evidence to be spread on the record so that the party offering it will have it there to argue to a clearer, wiser head on appeal rather than to perhaps handicap a party by erroneously rejecting evidence, so I will tend to be, as I said, very generous in the rulings of evidence on evidence.

Is there anything else we could discuss as a procedural matter before we get under way?

MR. BERGAN: May I raise one, your Honor?

THE COURT: Please do.

MR. BERGAN: Your Honor, our first witness, a very brief witness, will be Mr. Donald Denkhaus from Arthur Andersen.

* * * *

APPENDIX 29

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER ON REMAND (O&Y/MCJV APPEAL)

Olympia & York Florida Equity Corp. (O&Y), as a creditor and as general partner of Miami Center Joint Venture (MCJV), appealed this court's Confirmation Order dated August 8, 1985 (C. P. No. 906) confirming a chapter 11 plan of reorganization for these five debtors. The District Court's Memorandum Opinion dated June 30, 1986 (which reached this court July 16) remanded the case:

> "to hold further adversarial hearings and to enter such findings of fact and conclusions of law as are necessary to provide this court with an adequate basis to resolve this appeal." [1]

A hearing on remand was held September 25 at which the parties agreed that neither desired to offer any evidence and neither required any further adversarial hearing other than brief argument by counsel. (C. P. No. 1421).

---

[1] The deadline specified for compliance, August 29, has been twice extended at the joint request of the parties to November 17. The pendency of this appeal has not delayed substantial consummation of the plan and the issues at stake here affect only appellant, the appellee Bank of New York, and possibly the debtor Theodore B. Gould, who has received notice of all proceedings on this remand.

Argument was heard that day and the parties agreed that no other hearings were necessary. Although the related debtor, Gould, was present through counsel, neither he nor any other party elected to participate.

By mutually agreed prior arrangement, both the appellant (C. P. No. 1403) and the appellee (C. P. No. 1404) submitted comprehensive and detailed proposed findings and conclusions, respectively 17 and 43 pages in length,[2] together with supporting memoranda (C. P. Nos. 1405, 1406).

I presume counsel understand what will best assist Judge Atkins. Recognizing the weight accorded to adopted findings, *Anderson v. Bessemer City*, 470 U.S. —— (1985), I have used the time available to me to review carefully the proposed findings and conclusions and the parties' memoranda together with the entire record, instead of attempting to reword and retype forty to fifty pages of similar detail. For the most part, the facts flow from uncontroverted matters of record. The parties differ in the emphasis they give and the inferences they draw from the undisputed events.

I reject the proposals of the debtors as reflecting in essential respects the contentions I considered and rejected previously. I adopt the Bank's proposed findings of fact and conclusions of law, copies of which are attached and incorporated in this Order. They accurately represent my own considered conclusions as to both the facts and legal principles implicit in the Confirmation Order of August 8, 1985 (C. P. No. 906). It was not possible, in this case,

---

[2] Official Form 31, prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009 as the form for a chapter 11 Order Confirming Plan, is a page and a half and contains only the eight statutory requirements of 11 U.S.C. § 1129(a) rephrased as mixed findings and conclusions. The substance of this Official Form was incorporated in this court's Confirmation Order of August 8, 1985. (C. P. No. 906).

to hear all the issues and parties during one uninterrupted session.

Findings of Fact

A. *Parties*

1. The five debtors are Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP') of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

2. The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium", and an adjoining parking garage (collectively, the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

3. MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots (consisting of three full blocks of prime downtown property and another parcel upon which the building of two million square feet of commercial space is being proposed) near the existing Miami Center Project. Gould and O&Y as the only partners originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners prevented any construction or development to date.

4. Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by this Court, and have been active, for the Holywell, MCLP and MCC estates.

B. *Jurisdiction*

5. This Court has jurisdiction over these reorganization proceedings and over the parties pursuant to 28 U.S.C. § 157, the standing order of reference in this District, and the Memorandum Opinion of the District Court ordering remand.

C. *The Nature of the O&Y and MCJV Claims*

6. MCJV was in an unusual position in these bankruptcy cases, because one of its 50% general partners (O&Y) was a creditor, while the other (Gould) was a debtor. When the debtors filed their petitions on August 22, 1984, the two partners had already been engaged in arbitration proceedings against each other in New York City for more than two years. This Court granted relief from stay [C.P. No. 171, 190] in order to permit the Arbitration Tribunal to determine the amounts owed by each of the partners to the other, the appropriate method for dissolving MCJV under the partnership agreement, and the procedure for disposition of MCJV's assets. As of the date of the initial Confirmation Order, the Arbitration Tribunal had directed that Gould might elect either of two options:

(a) Gould could purchase O&Y's interest for a sum slightly in excess of $46 million ($16 million of indebtedness to the Bank of Montreal, $30 million of advances by O&Y, and capital of $10,000); or

(b) MCJV would be dissolved by a receiver appointed by the arbitrators, and its assets distributed according to the following priority:

(i) payment of all debts and liabilities of MCJV to parties other than Gould and O&Y, including payment of the expenses of the liquidation and the fee of the receiver as approved by the arbitrators.

(ii) payment of Gould's return of capital in the amount of $7,875,000 with interest thereon, less:

(A) The amount of $864,642 of development expenses, with interest thereon; and

(B) The amount, if any, of the gross revenues of the MCJV parking operations, with interest thereon, owed to MCJV.

(iii) payment to O&Y of its advances, with interest thereon, after deduction of $10,000,000.

(iv) payment of the balance to Gould and O&Y in equal amounts.

[Paragraph 4, Arbitration Award of June 1, 1984; C.P. No. 149, Exhibit "B"].

7. Initially, Gould elected the first of the two options. However, five days before the closing of the $46 million buyout was to occur, Gould and the other debtors filed their voluntary petitions under Chapter 11 in this Court [C.P. No. 80, 149]. On his schedules [C.P. No. 278], Gould listed (a) indebtedness of $30,010,000 to O&Y, secured by MCJV assets worth $109,650,000 and (b) indebtedness of $16,000,000 to the Bank of Montreal, a primary obligation of MCJV. He later filed an MAI appraisal [C.P. No. 149, Exhibit "C"] evaluating MCJV's real estate at $104 million. He claimed that his equity interest in MCJV was $57 million [C.P. No. 278, Schedule B-2].

8. On September 20, 1984, O&Y moved for Gould's removal as "managing venturer" of MCJV (and for authorization for O&Y to replace him). O&Y alleged:

> Mr. Gould has an irreconcilable conflict of interest in serving as Managing Venturer, which arose before the bankruptcy proceeding was filed and which have become more pronounced due to his and his related entities seeking the protection of this Court. Among other things, Mr. Gould have done and/or is doing the following:
>
> A. Failing to render full accounting as Managing Venturer to O&Y or the Joint Venture;
>
> B. Diverting substantial partnership revenues including those revenues derived from the surface parking lots on the Commercial property sites (approximating $60,000 of net revenues per month, or amounting to approximately $1,700,000, with interest, to the date of the Petition) without accounting for such revenues to his partner, O&Y.
>
> C. Treating and dealing with the property of the Joint Venture as his own, in disregard of the fact that it is owned by a Joint Venture, that O&Y is the primary creditor in interest, and guarantor of its bank debt. He has offered the property for sale in the market place as part of a package with his own personal aggregation of properties.
>
> D. He has dealt and is continuing to deal with the City of Miami and has conducted negotiations with the City concerning easements and access ramps, which vitally concern the rights and interests of the Joint Venture, and has pursued proposals which would benefit his own interests at the expense of the Joint Venture.

E. He has failed to pay the Joint Venture the aggregate outstanding and defaulted rental payments, which, with interest, exceed $15 million, upon the Furniture, Fixtures and Equipment (FF&E) leased by the Joint Venture to the MCLP hotel project, and has failed to even make a demand or claim for payment of these obligations upon MCLP, of which he is general partner and the primary party in interest.

F. As Managing Venturer and partner, Mr. Gould previously wrongfully obtained more than $850,000 from the Joint Venture as an alleged reimbursement for development costs, later discovered to be for real estate taxes and "interest" costs unrelated to reimbursable costs permitted under the Joint Venture Agreement. These monies have never been repaid to the Joint Venture, despite a written undertaking to make such repayment, and approximate $1,150,000 with interest.

[C.P. No. 80, Paragraph 10].

In a later memorandum in support of that motion, O&Y again alleged that Gould had, "an irreconcilable conflict of interest" in his position as managing venturer of MCJV [C.P. No. 158, page 3].

9. O&Y filed four proofs of claim, both for itself and "for the benefit of" MCJV:

(a) In the Holywell case (Case No. 84-01590-BKC-TCB), O&Y/MCJV sought approximately $1.7 million, based upon Gould's alleged diversion of that amount from parking revenues (the vacant MCJV lots operated as parking lots) to "Parkwell", a wholly-owned subsidiary of Holywell [Proof of Claim No. 362].

(b) In the MCLP case (Case No. 84-01591-BKC-TCB), O&Y/MCJV sought $15.3 million as unpaid rent and in-

terest due under the "A" and "B" furniture, fixture, and equipment ("FF&E") leases between MCJV and MCLP. MCJV acquired the FF&E with $7.775 million advanced by O&Y. That proof of claim alleged that Gould, as managing venturer of MCJV, had never properly honored and enforced the two leases, as general partner of MCLP, and that no payments were ever made by MCLP to MCJV. Further, O&Y acknowledged that the FF&E lease claim, "is subject to adjustment for dividends actually received" from the Gould and MCC estates to the extent dividends pertain to the FF&E leases [Proof of Claim No. 241].

(c) In the MCC case (Case No. 84-01592-BKC-TCB), O&Y and MCJV merely reasserted the claim against MCLP, since MCC is liable as a general partner of MCLP for all of MCLP's debts [Proof of Claim No. 254].

(d) In the Gould case (Case No. 85-01594-BKC-TCB), O&Y/MCJV sought, "an amount exceeding $40 million" for Gould's indebtedness to O&Y with respect to MCJV. [Proof of Claim No. 251, page 2]. The proof of claim lists several subcategories, and acknowledges that the O&Y claims against four of the five estates are overlapping or duplicative:

(1) One component of the claim is "funds O&Y advanced for MCJV to purchase its real property" [*Id.*, Paragraph 3.C]. The amount has never been specified.

(2) A second component is comprised of O&Y's advances to MCJV, "for development costs, fees, taxes, and interest, and . . . for other expenditures and carrying costs related to the projects . . ." [*Id.*]. The amount has never been specified.

(3) A third part of the claim repeats the $15.3 million claim against the MCLP estate:

> Included in this amount [the gross amount of the claim, alleged to exceed $40 million] are the substantial, cumulative advances by O&Y for the purchase by MCJV of the furnishings, fixtures, and equipment

("FF&E") leased to the Miami Center Limited Partnership . . . [*Id.*].

(4) A fourth part of the claim is MCJV's $16 million indebtedness to the Bank of Montreal, guaranteed by Gould and by O&Y, and ultimately paid or assumed by O&Y [*Id.*, Paragraph 3.D].

(5) A fifth component of the claim is an unliquidated amount representing future and "continually increasing expenses and carrying costs relating to the MCJV property" [*Id.*, Paragraph 3.E].

(6) A sixth component of the claim is an unliquidated amount sought because:

> As Managing Venturer and partner, Mr. Gould previously wrongfully obtained more than $850,000 from the Joint Venture as an alleged reimbursement for development costs, discovered to be for real estate taxes and "interest" costs unrelated to reimbursable costs permitted under the Joint Venture Agreement."
>
> [*Id.*, Paragraph 3.F.].

(7) A seventh component of the claim repeats O&Y's claim against the Holywell estate for "approximately $1.7 million" because of Gould's alleged diversion of "substantial revenues derived from parking lots on commercial site property owned by MCJV for his own benefit". [*Id.*, Paragraph 3.G.].

(8) The eighth and final component of the claim is an unliquidated deficiency claim against Gould as "general partner and/or guarantor" in the event that MCJV's assets are insufficient to satisfy MCJV's indebtedness to third parties and to O&Y [*Id.*, Paragraph 3.H.].

The O&Y/MCJV proof of claim against Gould acknowledges that O&Y and MCJV may realize upon their claims against Gould by reducing his one-half equity interest in MCJV:

> This claim is not subject to any set off or counterclaim, although Gould, as a general partner in MCJV owns a one-half interest in the equity in its property, after adjustment for all claims by the MCJV against him and related companies and entities and satisfaction of all the MCJV's debts. O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity have also filed proof of claims in related cases, *In Re: Miami Center Limited Partnership*, Case No. 84-01591-BKC-TCB and *Miami Center Corporation*, Case No. 84-01592-BKC-TCB, for claims arising out of the defaults of the above-described FF&E leases. To the extent dividends are received from these related debtors, for claims arising out of the FF&E leases, an adjustment to this claim may be made.
>
> [*Id.*, Paragraph 7].

In addition, the proof of claim states that O&Y and MCJV have a security interest over Gould's equity in MCJV:

> No security interest is held by O&Y or MCJV against Gould, except his interest in MCJV's property, inclusive of the ownership of the FF&E leased property rights, claims and interests, as above-described.
>
> * * * *
>
> This claim is a general unsecured claim, except to the extent of MCJV's right and obligation to divide and apportion the MCJV's liabilities owed by Gould and related entities and corporations to it.
>
> [*Id.*, Paragraphs 8 and 9].

10. Subsequently, Gould and O&Y reached agreement upon certain aspects of the FF&E lease claim by MCJV against MCLP and Gould. A separate proof of claim was filed by MCJV on July 3, 1985 for a total of $14,417,679, consisting of $6,672,679 for defaulted rental payments

and interest, and $7,745,000 as the option price for acquisition of the FF&E from MCJV [Proof of Claim No. 502]. The Bank filed objections to the claim [C.P. No. 811]. As of the date of the Confirmation Order, the validity and amount of the claim had not been determined. The proof of claim stated that it was submitted, "without prejudice to the claims and rights of its two general partner joint venturers in any matters litigated", that monthly rental payments were to have commenced March 1, 1983, and that, "no rental payments have ever been made by MCLP, or other parties on its behalf, to MCJV". [*Id.*, page 2]. O&Y did not modify or amend its prior claims against the MCLP and Gould estates to reflect MCJV's FF&E claim.

D. *The Debtors' Plans*

11. The debtors filed a separate, amended disclosure statement and plan for each estate; however, all were nearly identical in form and substance [C.P. No. 466-470].

12. The debtors' plans were predicated upon:

(a) the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for $260 million;

(b) the payment of undisputed claims from approximately $32 million realized by Holywell, a wholly-owned subsidiary, and Gould in January, 1985 from the sale of other real estate in the Washington, D.C. area (by Order entered December 31, 1984, C.P. No. 303, such funds were determined to be cash collateral under 11 U.S.C. § 363, subject to the Bank's first lien);

(c) the pursuit in the District Court of a lawsuit against the Bank and its participating lenders (*Miami Center Limited Partnership, et al. v. The Bank of New York, et al.*, Case No. 85-0228-Civ-Hoeveler; the "District Court Action") for alleged fraud, usury, breach of contract, and civil claims under the federal RICO act; and

(d) equitable subordination of the Bank's construction loan and mortgages under 11 U.S.C. § 510(c).

E. *Objections to the Debtors' Plans*

13. Objections to the debtors' amended plans were filed by the Bank [C.P. No. 535], by the Creditors' Committees [C.P. No. 516, 567], and by other creditors. O&Y objected [C.P. No. 533] to the debtors' plans upon the grounds that:

(a) the debtors' plans were based on a 'wholly speculative agreement" with Hadid, "replete with holes and contingencies";

(b) O&Y and MCJV, "would be subjected to continuing delays, mounting costs and interest charges", and:

> The past record of the Debtors, and notably of Mr. Gould as the controlling and dominating person, is replete with evidence of unfounded representations, commitments and undertakings breached, and a myriad of obligations, assurances and agreements unfulfilled and repudiated. The record in these very proceedings, reflect the repeated experiences of partners and creditors with such abandoned commitments and undertakings.
>
> [*Id.*, Paragraph 3];

(c) "Gould, as proponent of the Debtors' consolidated plans, in light of his loss of credit and credibility in the real estate and financial markets, is perhaps the least likely prospect to achieve a prompt sale and disposition of the properties concerned and a discharge of the claims of creditors." [*Id.*, Paragraph 5];

(d) the debtors' plans classified the O&Y claims "in a separate and subordinate class", below those of other unsecured creditors;

(e) the debtors' plans lacked "sufficient funds . . . to provide for the repayment of all of [O&Y's] claims";

(f) the debtors' plans failed to provide for the discharge of the claims of O&Y under two agreements covering certain furniture, fixtures and equipment (the "FF&E"); and

(g) the debtors' plans failed to provide for the payment of debtor Holywell's liability, "to MCJV and [O&Y] of an amount of approximately $1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation." [*Id.*, Paragraphs 13 and 14].

F. *The Bank's Plan*

14. The Bank filed an amended, consolidated disclosure statement and plan [C.P. No. 478] which was further amended [C.P. No. 854] during the course of the confirmation proceedings. The Bank also entered into certain stipulations with the Creditors' Committees [C.P. No. 564, 614, 709c, and 876a]. Neither the stipulations nor the second amendment to the Bank's plan adversely affected any party other than the Bank.

15. The central features of the Bank's amended, consolidated plan were:

(a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E, for its MAI-appraised value of $255.6 million, comprised of (i) satisfaction of the Bank's judgment lien, computing interest at the contract or "good standing" rate rather than the higher default rate, and (ii) the balance, after closing adjustments and prorations, in new cash;

(b) the establishment of the "Miami Center Liquidating Trust", consisting of all other assets of the debtors, for the payment of all other claims by a court-appointed Liquidating Trustee;

(c) the release by the Bank of its cash collateral (approximately $30 million), for addition to the new cash generated by the sale of the Miami Center Project (ap-

proximately $13.6 million), with the combined funds to be used by the Liquidating Trustee to pay the claims of all other creditors;

(d) a further financing commitment of approximately $14.4 million by the Bank for payment of the claim of MCJV for the FF&E, (i) if and when such claim is allowed over the Bank's pending objections, (ii) to the extent other assets of the Liquidating Trust prove insufficient to pay the claim, and (iii) if it is ultimately determined that MCJV has been damaged by its (allegedly) improper classification under the Bank's plan;

(e) dismissal of the debtors' District Court Action by the Liquidating Trustee; and

(f) the consolidation of all five estates in a manner such that the unaffiliated creditors of Holywell are paid first, the unaffiliated creditors of the other debtors are paid next, and the many inter-debtor and related party claims are paid thereafter.

G. *The O&Y and MCJV Objections to the Bank's Plan*

16. (a) O&Y objected to the Bank's plan [C.P. No. 532, 817a, 871], upon the grounds that the Bank's plan allegedly:

(1) assumes title to the MCJV FF&E without adequate and priority payment of sums claimed to be due under the FF&E agreements; and

(2) "fails to provide for payment of Gould's and Holywell Corporation's obligations to O&Y through MCJV of an amount of approximately $1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation . . .".

(b) MCJV objected to the Bank's plan as well [C.P. No. 808] upon the grounds that the Bank's plan allegedly failed to provide proper payment and priority for the MCJV FF&E claims.

H. *Classification and Treatment of the O&Y/MCJV Claims Under the Bank's Plan*

17. Under the Plan, the O&Y and MCJV claims were the only claims in Class 7 [C.P. No. 479, page 16]. Although nominally junior to the claims of secured creditors unaffiliated with the debtors (Class 4) and unsecured creditors unaffiliated with the debtors (Class 6), the O&Y and MCJV claims were (i) senior to the claims of the Gould-affiliated creditors (Class 8), (ii) senior to the claims and interests of the debtors, including Gould (Class 9), and (iii) secured by Gould's equity interest in MCJV. This classification structure, together with the consolidation of the assets of the five debtor estates, and the utilization of the Bank's $30 million of cash collateral for the payment of creditors, assured that Gould's substantial 50% equity in MCJV would be available for the satisfaction of the O&Y claims against MCJV before any distribution could be made to Gould himself or to his wholly-owned (Class 8) entities.

18. Mechanically, the Bank's plan contemplated that the claims of O&Y and MCJV would be secured and paid as follows:

(a) With respect to the MCJV claim for the defaulted rental payments and option price of the FF&E:

(1) On the effective date of the plan, title to all property interests of the five substantively-consolidated estates would pass to a Liquidating Trust to be administered by a Court-appointed Liquidating Trustee. Such property interests included: the Miami Center real estate and improvements; debtor/lessee MCLP's rights to exercise the purchase options under the FF&E leases; and Gould's equity interest in MCJV [C.P. No. 479, Article V, page 20].

(2) At closing, the Bank or its designee would purchase the Miami Center Project, including the FF&E, from the Liquidating Trustee for $255.6 million. Sev-

eral million dollars of that price would be paid to the Liquidating Trutee in cash above the Bank's judgment lien. In addition, the Bank would release its claim to approximately $30 million of its cash collateral, making those funds available to the Liquidating Trustee as well [*Id.*, pages 18-19].

(3) The Liquidating Trustee would then pay or otherwise provide for the payment of MCJV's claim from those funds and/or from other assets of the Liquidating Trust, including Gould's equity interest in MCJV [*Id.*, Article IV(b)(iii), page 18].

(b) With respect to the overlapping O&Y/MCJV claims against MCLP, Gould, Holywell, and MCC:

(1) The O&Y/MCJV claim against MCLP is identical to, and was apparently replaced by, the MCJV claim under the FF&E leases as filed against MCLP by O&Y, MCJV and Gould jointly [Paragraph 10, *supra*]. That claim would be satisfied as described in subparagraph (a) above.

(2) The above O&Y/MCJV claims continued to be secured, as set forth in the O&Y/MCJV proofs of claims [Paragraph 9(d), *supra*], by Gould's 50% equity interest in MCJV. Payment of the claims would occur from the Liquidating Trustee's available cash or from the proceeds of dissolution and sale of MCJV as provided by the Arbitration Award [Paragraph 6, *supra*]. The $104 million MAI appraisal of MCJV's real estate [C.P. No. 149, Exhibit "C"] was never contravened by O&Y or MCJV, and substantiated the debtors' and the Bank's position that the O&Y/MCJV claims were amply secured. Both O&Y's and Gould's equity interests in MCJV would also be increased by 50% of any sum paid to MCJV by the Liquidating Trustee under the FF&E leases.

I. *Voting by the Creditors*

19. After the debtors' and the Bank's disclosure statements were approved, and pursuant to this Court's order

[C.P. No. 405], separate ballots for the debtors' plans and for the Bank's plan were transmitted to all creditors for return by April 29, 1985. On that date, the Court held an initial confirmation hearing and, with the assistance of counsel, established a procedure for the tabulation of the ballots and for certification by the plan proponents of the availability of all funds necessary for consummation should a plan be confirmed [C.P. No. 611, 612, 619].

20. The requisite certificates respecting the voting and the funding were filed by each side on May 13, 1985, as directed [C.P. No. 658-664], and were reviewed by the Court.

21. The voting indicated overwhelming support for the Bank's plan among the creditors, and rejection of the debtors' plans. Creditors in Classes 1 through 5 approved the Bank's plan by well over the minimum margins required (one-half in number and two-thirds in dollar amount, per 11 U.S.C. § 1126(c)). However, O&Y and MCJV (Class 7 under the Bank's plan), certain wholly-owned subsidiaries of Holywell controlled by Gould (Class 8), and the debtors themselves (Class 9), voted against the Bank's plan. Accordingly, the Court was required to determine whether the plan met the requirements of 11 U.S.C. 1129(b).

J. *Establishment of the Bank's Lien*

22. In order to establish the amount, validity, and priority of its lien over the debtors' property, the Bank filed an adversary proceeding against the debtors (Adv. Pro. No. 85-0160-BKC-TCB-A).

23. That proceeding culminated in the entry by this Court of:

(a) a final judgment in favor of the Bank for principal and interest of $234,342,742.93, plus interest of

over $75,000 per day as of March 14, 1985 [C.P. No. 21 in Adv. Pro. 85-0160]; and

(b) a memorandum decision upholding the two releases executed by the debtors in favor of the Bank (and its participating lenders), and determining that those releases barred the fraud, breach of contract, usury, and RICO theories raised by the debtors as purported defenses in this Court and as claims in the District Court Action [C.P. No. 20 in Adv.Pro. 85-0160].

K. *"True Lease" Issue*

24. Next, as part of the continuing confirmation process, the parties advised the Court that characterization of the so-called "A" and "B" FF&E leases between MCJV and MCLP (debtor Gould was managing general partner of each), as "true leases" or as "leases intended for security" could be dispositive of the FF&E claims asserted by O&Y and MCJV. The Bank filed [Adv. Pro. No. 85-0566-BKC-TCB-A] an adversary proceeding against the affected parties seeking a determination of the nature (secured or unsecured), extent, and value of such claims.

25. After an evidentiary hearing, the Court entered an extensive memorandum opinion [C.P. No. 26 in Adv. Pro. 85-0566] holding that the two agreements were "true leases" (and, therefore, that MCJV owned the FF&E, subject to debtor MCLP's option rights under the leases). The Court was not asked to, and did not, determine in that proceeding the validity or priority of MCJV's claim, or the proper amount of that claim assuming exercise of MCLP's option to acquire the FF&E (as provided by the Bank's plan). The Bank appealed that decision (Case No. 85-3430-Civ-Atkins), but the District Court affirmed by memorandum opinion entered June 23, 1986.

L. *Further Hearings*

26. During the confirmation process (April 29 through August 8, 1985), the Court held numerous other hearings and invited counsel to submit such memoranda and request such hearings as they might deem appropriate or necessary to supplement the already-voluminous record before the Court. During that time, no further evidentiary hearings were requested by O&Y or MCJV. Although O&Y and MCJV have argued that an evidentiary hearing is mandatory with respect to the subordination of a claim, the case law is to the contrary. *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206, 211, n.3 (5th Cir. 1983).

M. *Rejection of the Debtors' Plans*

27. As set forth in this Court's detailed Order on Remand of January 29, 1986 [C.P. No. 1188], the creditors and this Court rejected the debtors' plans.

N. *Findings on Classification of the O&Y and MCJV Claims Under the Bank's Plan*

28. The objections relating to the classification structure of the Bank's plan came only from entities which Gould controlled (MCJV, of which he was then "managing venturer" and general partner, and HTC and HLC, of which he was president and sole owner through his 100% ownership of Holywell), or with whom he was a partner (O&Y and the minority limited partners of MCLP).

29. The claims of MCJV and O&Y were classified as "Class 7" under the Bank's plan, junior in priority of distribution to the claims of secured (Class 4) and unsecured (Class 6) creditors that were not affiliated with Gould. The MCJV and O&Y claims are not substantially similar to the claims of those unaffiliated creditors, because:

(a) Any distribution to MCJV increases the value of debtor Gould's 50% equity in MCJV;

(b) MCJV has direct recourse by setoff against Gould's equity interest in MCJV's real estate (worth $104 million), while the unaffiliated unsecured creditors have no such recourse;

(c) the MCJV claim was asserted by a purported creditor (MCJV) controlled by a debtor (not the case for any Class 6 creditor); and

(d) similarly, O&Y stands to realize 50% of any distribution to MCJV, and has direct, secured recourse against Gould's 50% equity in MCJV, for O&Y's claims against the debtors (Paragraph 9, *supra*).

O. *Findings on Equitable Subordination*

30. O&Y and MCJV have maintained that this Court lacked a sufficient factual basis to equitably subordinate such claims. As the conclusions of law demonstrate (see Paragraphs 36 through 41, *infra*), the Court approved the junior classification accorded such claims by the Bank's Plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. § 1122) that had no such affiliation with the debtors.

31. So that the record is clear, however, the factual prerequisites for equitable subordination of the MCJV and O&Y claims are also established by the record. Gould engaged in inequitable conduct, including:

(a) The payment of $1,051,844.67 by Gould to himself from Holywell's cash in the 11 months preceding bankruptcy [Exhibit 4, Question 19b, C.P. No. 275], at a time when he was wrongfully refusing to pay numerous unaffiliated creditors of all of the debtors;

(b) Gould's advances of approximately $3.8 million from Holywell to 14 wholly-owned, non-debtor subsidi-

aries of Holywell, to the detriment of Holywell's and Gould's creditors [C.P. No. 275, Schedule B-2];

(c) conflicts of interest resulting from Gould's control of both lessor and lessee under the MCJV-MCLP FF&E agreements (as alleged by O&Y/MCJV; see Paragraphs 8, 9(a), 9(d)(6), and 9(d)(7), *supra*); and

(d) Gould's failure to pay withholding taxes for Holywell Hotels, Inc. and Holywell Construction Company with the result that his estate was charged for $2.5 million in penalties under 26 U.S.C. § 6672, to the detriment of creditors [C.P. No. 278, Schedule A-1].

32. Gould's misconduct injured his creditors and, but for the substantive consolidation of the five estates and junior classification of the related-party claims as provided by the Bank's plan, Gould's inter-company liabilities would have permitted Gould, and non-debtor entities controlled by him, to receive distributions from the "cash-rich" estates (the Gould and Holywell estates, if contingent liabilities are disregarded), while unaffiliated creditors of the cash-poor estates (principally MCLP) would have received dividends (if any) amounting to less than full payment of their claims. Such misconduct is imputed as a matter of law to the entities for which Gould acted (see Paragraph 42 in the Conclusions of Law which follow), including O&Y and MCJV. O&Y and MCJV engaged in other acts and misconduct justifying equitable subordination, as detailed in Paragraphs 43 to 45, below.

P. *Valuation of the Project*

33. Prior to confirmation, no party or attorney for a party requested a valuation hearing. The Court had before it the following evidence as to the value of the Miami Center Project:

(a) the debtors' appraisal [C.P. No. 392], setting the value of the Project at $260.5 million (land and buildings) plus $14.5 million (FF&E) as of October 1, 1984;

(b) the Hadid contract [Exhibit "A" to C.P. No. 378] of February 11, 1985, for a gross purchase price of $260 million, apparently exclusive of the FF&E;

(c) the liquidation values assigned to the property by the debtors in their disclosure statements: $210 million for the structures [Exhibit "E" to C.P. No. 378] and $23.4 million for the underlying land [Exhibit "E" to C.P. No. 380], or a total of $233.4 million without the FF&E; and

(d) the Bank's appraisal [C.P. No. 479, 796], setting the value of the Project including the FF&E at $255.6 million as of November 15, 1984.

34. The Court finds that the Bank's proposed purchase price of $255.6 million, including the FF&E, was fair and equitable, and considerably in excess of the liquidation value of the Project as computed by the debtors. The Bank's offer was the only firm offer available, and had the added benefit of releasing over $30 million of the Bank's cash collateral for the payment of other creditors. In the Confirmation Order of August 8, 1985, this Court noted:

> The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

The absence of offers in excess of the Bank's proposal is significant. The Bank's purchase price and MAI appraisal ($255.6 million, including FF&E) are between the debtors' liquidation estimate ($233.4 million, without FF&E) and the debtors' MAI appraisal ($260.5 million without FF&E, or $275 million with FF&E). The dif-

ference between the values computed by the Bank's appraiser and the debtors' appraiser using the income approach was less than 5%

Q. *Consummation of the Bank's Plan*

35. The Court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) all Class 1 administrative claims have been paid or reserved for;

(b) the Project was sold on October 10, 1985, to the Bank's designee, a good faith purchaser, resulting in the satisfaction in full of the claim of the Class 2 creditor (the Bank) and the termination of interest (accruing at over $2 million per month) and negative cash flow from operations;

(c) the Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and

(f) there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact amount cannot yet be determined because several of the claims are unliquidated).

Conclusions of Law

R. *Classification*

36. Section 1122(a) of the Code directs that, with a single exception not applicable here, "a plan may place

a claim of interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class".

37. The O&Y and MCJV claims are not similar to the claims of creditors that were not affiliated with Gould, both as to the ultimate effect of payment of such claims and as to the special property held by O&Y and MCJV (see Paragraph 29 above). In the case of MCJV:

(a) Payment of MCJV's claim will increase debtor Gould's 50% equity interest in MCJV by 50% of the payment. MCJV's claim is in essence a hybrid of debt (to the extent that O&Y, a non-debtor is benefited) and equity (to the extent that a debtor, Gould, is benefited.

(b) MCJV's claim can readily be satisfied from special property (the four downtown lots, appraised at $104 million) held by MCJV and not directly available to satisfy the claims of creditors that are not affiliated with Gould. MCJV's claim can be satisfied by merely reducing Gould's equity interest in, and other claims against, MCJV. Under the equitable principle of marshalling, MCJV is required to look first to a source of recovery unavailable to other competing creditors. *In re All American Holding Corp.*, 10 B.R. 71, 73 (Bktcy. S.D. Fla. 1981), *aff'd* 17 B.R. 926, 928-29 (S.D. Fla. 1982). *Matter of Emerald Hills Country Club*, 32 B.R. 408, 421-22 (Bktcy. S.D. Fla. 1983).

38. In the case of O&Y, the marshalling analysis set forth above is also applicable. As the only other general partner of MCJV, O&Y has access to a special source of recovery (Gould's equity interest in MCJV) that is unavailable to other creditors. Additionally, any payment to O&Y reduces O&Y's parallel claim against MCJV in the remanded arbitration proceedings now pending between O&Y and Gould, thereby increasing Gould's 50% equity interest. By reducing the aggregate liabilities of MCJV, any such payment benefits Gould by an amount

equal to 50% of the payment. That is not the case with respect to payments made by the debtors to unaffiliated creditors. The Court also notes that the debtors' plans [C.P. No. 466-70] classified O&Y separately, based upon the fact that O&Y has recourse to the MCJV property. The debtors' plans contemplated that O&Y would not be paid until (a) the arbitration and litigation between O&Y and Gould reached an end and (b) MCJV sold a substantial part of its real estate.

39. Both O&Y and MCJV are "insiders" under 11 U.S.C. § 101(28)(A) (subparagraph (ii), as to MCJV, and subparagraph (iii), as to O&Y). On facts similar to those here it has been held that an insider may not, "share the same priority with general unsecured creditors of the Debtor". *In re Economy Cast Stone Co.*, 16 B.R. 647, 651 (Bktcy. E.D. Va. 1981); *In re Toy & Sports Warehouse*, 37 B.R. 141 at 152 (Bktcy. S.D.N.Y. 1984).

40. The debtors' proposed plans also accorded a junior priority to the claims of "Affiliated Creditors", defined to include entities "in which the Debtor owns an equity interest", thereby assigning a junior classification to the claims of MCJV. Gould proposed and agreed to that treatment at a time when he was Managing Venturer of MCJV.

41. The unaffiliated creditors would not likely have accepted a plan which gave higher or equal dignity to the claims of MCJV and O&Y. The claims of the Gould-affiliated entities are not "substantially similar", either legally or in practical effect, to the claims of the unaffiliated creditors assigned separate and senior classes by the Bank's plan. Accordingly, the Bank's classification structure complies with 11 U.S.C. § 1122(a).

S. *Equitable Subordination*

42. Based upon the Court's findings with respect to the conduct of Gould, O&Y, and MCJV (Paragraphs 31, 43,

and 44), the Court concludes that equitable subordination under Sections 510(c) of the Code and the tripartite test of *Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977), is warranted. The claims of MCJV and O&Y warrant equitable subordination because Gould's misconduct, and the attendant prejudice to other creditors, is imputed to those claimants as a matter of Florida partnership law (Chapter 620, Fla. Stat.) and the law of agency:

> (1) *620.62 Partnership bound by partner's wrongful act.* When loss or injury is caused to a person, not a partner in the partnership . . . the partnership is liable for it to the same extent as the partner so acting or omitting to act.
>
> (2) *620.625 Partnership bound by partner's breach of trust.* The partnership is bound to make good the loss:
>
> (i) When one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
>
> (ii) When the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by a partner while it is in the custody of the partnership.
>
> (3) *620.63 Nature of partner's liability.* All partners are liable:
>
> (i) Jointly and severally for everything chargeable to the partnership under §§ 620.62 and 620.625.

MCJV and O&Y themselves alleged such misconduct by Gould in their written submissions to the Court and in their proofs of claim (Paragraphs 8, 9, and 13 above). On the record here, Gould and his partner will not be permitted by this Court to receive distributions before the unaffiliated creditors.

43. Undercapitalization is also a proper basis for equitable subordination. *In re McFarlin's, Inc.*, 49 B.R. 550, 556 (Bktcy., W.D.N.Y. 1985); 3 *Collier on Bankruptcy*, ¶ 510.05[4][a] at 510-16 (15th Ed.).

> Generally, courts have either set aside or subordinated insider debts arising from transactions and undercapitalized corporations. As compared with non-insider creditors who lack control of or access to information concerning the corporation's financial health, the insider's advantage is obvious and unfair. *In re Labelle Industries, Inc.*, 44 B.R. 760, 763 (Bktcy., D.R.I., 1984). See also *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206, 212 (5th Cir. 1983).

O&Y's advances to MCJV, which it sought to recover from Gould in the bankruptcies, and MCJV's lease claim against MCLP, left MCLP dangerously undercapitalized. As of December 31, 1983, MCLP was left with a negative capital of $36,247,576 [Page 2, Plaintiff's Ex. 13 in Adv. Pro. 85-0566]. Both MCPL and its creditors were harmed by MCLP's undercapitalization and the appearance (to tradesmen and other unaffiliated creditors) that the FF&E was owned by MCLP. MCJV and O&Y did not file financing statements evidencing any interest in the FF&E, and O&Y's advances to MCJV were, "not evidenced by notes or similar documents of indebtedness" [Note F, page 11, Plaintiff's Ex. 14 in Adv. Pro. 85-0566]. MCJV and O&Y took no action to place non-insider creditors on notice of the undisclosed, rapidly escalating FF&E lease liability of the debtors.

44. O&Y has also contributed substantially to MCJV's and Gould's financial difficulties, to the detriment of other creditors. O&Y has never rebutted Gould's contention that O&Y breached the MCJV Joint Venture Agreement by failing to provide or arrange for the financing of Phases II and III of Miami Center [C.P. No. 149, page 2; the applicable provision of the Joint Venture Agree-

ment is set forth in Section 2.3(e), page 6, of Exhibit "A" to C.P. No. 149; Gould's testimony regarding O&Y's default is at C.P. No. 385th, page 70]. In arbitration proceedings, Gould charged O&Y, "with breach due to its failure to provide all of the requisite financing", and demanded, "that O&Y sell its venture interest to him as provided for in the section of the Agreement pertaining to defaults . . ." [Memorandum and Order of May 7, 1985, United States District Judge Whitman Knapp, affirming the Arbitration Award; C.P. No. 33, Exhibit "B", Adv. Pro. 85-0566]. The Arbitration Tribunal clearly agreed with Gould's position, because the award permits Gould to choose between (a) a purchase of O&Y's interest in accordance with the section of the Joint Venture Agreement pertaining to defaults [Section 8.6, page 30, Exhibit "A" to C.P. No. 149] or (b) a $10 million penalty to O&Y in liquidation (the third priority of payments in liquidation provided by the Award is, "payment to O&Y of its advances, with interest thereon, after deduction of $10,000,000" (see Paragraph 6(b), above).

45. The burden of proof necessary to subordinate the claim of an insider, fiduciary, or trustee is less stringent than the burden applicable to other claims. When the insider claimant is shown to have engaged in unfair conduct, "the claimant then must prove the fairness of his transactions with the debtor or his claim will be subordinated." *In re N & D Properties, Inc.*, Case No. 85-8890, Slip Op. Sept. 19, 1986, 5249, 5255 (11th Cir. 1986); *In re Multiponics*, 622 F.2d 709, 714 (5th Cir. 1980). Both O&Y and MCJV are "insiders" under 11 U.S.C. § 101 (28)(A) (See Paragraph 39, above). In light of O&Y's breach of its obligation to finance additional development, MCJV's use of the FF&E leases as a factor in MCLP's undercapitalization, and Gould's failure to take any action on behalf of MCJV against MCLP after default under the leases, it became incumbent upon O&Y and MCJV to prove affirmatively the fairness of their transactions with the debtors. Those two insider claimants did not do so.

T. *Section 365*

46. MCJV objected to the Plan because of the Plan's alleged failure to provide for immediate payment in cash of all sums claimed to be due under the FF&E leases between MCJV and debtor MCLP. That objection fails for the following reasons:

(a) Section 365 does not require an immediate cash payment. Section 365(b)(1) provides that a trustee (or, as here, a plan proponent) may not assume an unexpired lease unless the trustee or proponent:

> "(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease."

(b) The Bank, as proponent of the Plan, has provided "adequate assurance" of prompt cure, compensation for damages, and future performance by the Liquidating Trustee. First, the Bank provided a financing agreement (under the Second Amendment to the Plan [C.P. No. 854]) assuring that the Liquidating Trustee could borrow, at the risk of the Bank, a further $14.4 million if estate assets proved insufficient to pay the MCJV lease claim, to the extent that the claim was allowed, and if the claim prevailed in the various legal proceedings involving it. Second, MCJV did not bring an adversary proceeding to determine the extent, validity, and priority of its lease claim, nor did it request an evidentiary hearing for the determination of the Bank's objections to the July 3, 1985 claim [C.P. No. 811]. The Liquidating Trustee could not be expected to pay immediately a claim that had not been proven and fixed in amount.

(c) "Adequate assurance" and the Section 365 requirement of "prompt" cure and compensation were adopted from Uniform Commercial Code § 2-609(1). The legislative history of Section 365 states that both tests must be determined, "by consideration of the facts of the proposed assumption", and that no creditor, "should acquire greater rights in a case under the act than he has outside the act". *In re Sapolin Paints, Inc.*, 5 B.R. 412, 420 (Bktcy., E.D.N.Y. 1980), citing, "Report of the Commission on Bankruptcy Laws of the United States", H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Pt. II 156-57 (1973).

(d) On the record here, the claims of O&Y and MCJV "outside the act" were mired in the New York arbitration proceedings. At the time of the Confirmation Order, the June 1, 1984 Arbitration Award had been affirmed by the United States District Court for the Southern District of New York [C.P. No. 33, Exhibit "B", Adv. Pro. 85-0566], and O&Y had commenced a further appeal to the United States Court of Appeals for the Second Circuit. MCJV and O&Y had no reasonable expectation of payment in the near term because of the pendency of those proceedings and because of the objections to the claim in this Court.

(e) The availability of Gould's equity in MCJV, together with the Bank's funding agreement, provide "adequate assurance" that the Liquidating Trustee will perform when the validity and legal status of the claim have been determined. The position of O&Y and MCJV with respect to the FF&E lease claim is not worse than their position "outside the act", and the Plan's provision for payment of the lease claim complies with 11 U.S.C. § 365.

U. *Fairness and Non-Discrimination; Section 1129(b)*

47. Under Section 1129(b) of the Code, the Court may confirm a plan despite the rejection of a class of creditors

if all other requirements of Section 1129(a) have been fulfilled and, "if the plan does not discriminate unfairly, and is fair and equitable", with respect to that class. O&Y and MCJV were the only creditors in Class 7, and voted to reject the Bank's Plan. O&Y and MCJV claim that the Bank's Plan discriminates unfairly against them, and that the Plan is inequitable.

48. The alternative to confirmation of the Bank's Plan would have been a disastrous liquidation. The debtors' plans had been rejected by the creditors, including O&Y/MCJV, and neither O&Y nor MCJV ever proposed a plan. The debtors themselves assigned a liquidation value to the Miami Center Project (less the FF&E) of only $233.4 million [Exhibit "E" to C.P. No. 380]. The Bank's lien, computed at the default interest rate, was approximately $250 million, and was cutting further into the $30 million of cash collateral at about $2.5 million per month [C.P. No. 21 in Adv. Pro. 85-0160]. In view of the sizeable and first-priority real estate tax claims against the Miami Center Project, it was apparent that the Bank was undersecured and that the unaffiliated creditors would be left little, if anything, in a liquidation.

49. In effect, O&Y and MCJV wanted this Court to deny confirmation of the Bank's Plan until O&Y concluded its battles over MCJV with Gould in New York and O&Y could then claim a definite amount and priority. At the time of the Confirmation Order, those arbitration and appeal proceedings had been underway over three years, and no end was in sight.

50. O&Y's claims included and restated the MCJV lease claim. The record before the Court demonstrated that O&Y's claims could be fully satisfied from the proceeds of liquidation of MCJV's $104 million in real estate [Exhibit "C" to C.P. No. 149]. The creditors that were not affiliated with Gould had no such recourse, because the timing of the liquidation of MCJV was not under their control. O&Y, however, was and is able to exert

considerable influence over the process by which MCJV's assets are to be converted to cash and used to pay (a) O&Y as a creditor of MCJV and (b) thereafter, to the extent of Gould's equity in MCJV, the other creditors of the debtors.

51. O&Y and MCJV have not pursued various remedies which were or are available to them:

(a) Before confirmation, MCJV could have commenced in this Court (or in the state court, after obtaining relief from stay), a possessory action for recovery of the FF&E for non-payment under the "A" and "B" leases. The leases and applicable law afforded such a remedy to MCJV [Paragraph 24, Exhibits "A" and "B" to C.P. No. 1 in Adv. Pro. 85-0566]. It is evident that MCJV, O&Y, and Gould alike concurred (since they filed the joint FF&E lease claim of July 3, 1985) that recovery of the FF&E would be less desirable than the recovery of money damages. Having made that election, MCJV cannot now claim that the Plan is unfair because it "takes" the FF&E. MCJV received the Bank's amended disclosure statement and Plan and was fully aware that, if possession was not recovered before confirmation, MCJV would be left with a claim for compensation in accordance with the terms of the Plan.

(b) The Plan itself provides a procedure for this Court to review the classification or treatment of a claim if the circumstances warrant it. Neither O&Y nor MCJV has availed itself of those provisions. Article XIII permits O&Y and MCJV to apply for equitable relief from the substantive consolidation feature of the Plan. Article XIV provides for the retention of jurisdiction by this Court to resolve any other dispute or matter in connection with the consummation of the Plan. [C.P. No. 478, Plan, Articles XIII, XIV].

52. Balancing these equities, as a bankruptcy court must, this Court concludes that:

(a) The Bank's Plan does not discriminate unfairly against O&Y or MCJV and in favor of any competing creditors; and

(b) The Bank's Plan is fair and equitable in its treatment of Class 7, in that it affords that Class (i) a priority (which other creditors do not have) against MCJV and Gould's equity in MCJV, (ii) a mechanism for review of classification or treatment in the event that circumstances so warrant, and (iii) a special "funding agreement", available to no other Class, in the event that MCJV and O&Y ultimately prevail in their arguments respecting the amount, validity, and priority of the FF&E lease claim.

(c) The alternative, liquidation, would have had disastrous consequenecs for all creditors, including MCJV and O&Y.

V. *Confirmation Requirements*

53. The parties' certificates on the voting [C.P. No. 658-64] were verified by the Clerk's office.

54. The stipulations [C.P. No. 564, 614, 709c, and 876a] and second amendment [C.P. No. 854] did not adversely affect any party other than the Bank, and therefore did not require a supplemental disclosure statement or hearing for purposes of Code Section 1127. The Bank's Plan as amended, together with the stipulations, was accepted by the requisite number of creditors in Classes 1 through 6. (Paragraph 15, above; 11 U.S.C. § 1126(c)). The Gould-Affiliated Classes (7 through 9) rejected the Bank's Plan.

55. The Bank's Plan does not discriminate unfairly, and is fair and equitable with respect to O&Y and to MCJV. The Bank's Plan complies with Sections 1129(a) and (b) of the Code:

(a) The Bank's Plan complies with all of the applicable provisions of Chapter 11 of the Code.

(b) The Bank, as proponent of its Plan, has also complied with applicable provisions of Chapter 11.

(c) The Bank's Plan has been proposed by the Bank in good faith, and not by any means forbidden by law.

(d) Any payments made or promised by the Bank for services or for costs and expenses in, or in connection with, the case, or in connection with the Plan and incident to the case, have been disclosed to the Court; there were no such payments to be made before confirmation; and each such payment to be fixed after confirmation is subject to the approval of this Court as reasonable.

(e) The Bank has disclosed the identity and affiliations of the Liquidating Trustee, and the Trustee's appointment and continuance in office are consistent with the interests of the creditors and equity interest holders, and with public policy. Section 1142 of the Code specifically contemplates the possibility that a liquidating trust and trustee may be the entities designated by a plan to carry out the plan after confirmation. Further, the Bank has disclosed the identity of any insider that will be employed by or retained by the reorganized debtors, and the nature of any compensation for such insider.

(f) There are no regulatory commissions with jurisdiction (for purposes of Section 1129(a)(6)).

(g) With respect to each impaired class of claims or interests, (1) each holder of a claim or interest of such class has (A) accepted the Bank's Plan or (B) will receive or retain under the Plan on account of such claim or interest property of a value, as of the "Effective Date", that is not less than the amount such holder would receive or retain in liquidation, or (2) if Code Section 1111(b)(2) applies to the claims of such class, each such holder will receive or retain on account of such claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(h) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Bank's Plan provides that: (1) with respect to a claim of a kind specified in Sections 507(a)(1) or 507(a)(2) of the Code, on the Effective Date, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (2) with respect to a class of claims of a kind specified in Sections 507(a)(3), 507(a)(4), or 507(a)(5) of the Code, each holder of a claim of such class will receive, if such class has accepted the Bank's Plan, deferred cash payments of a value, as of the Effective Date, equal to the allowed amount of such claim (or, if such class has not accepted the Plan, cash on the Effective Date equal to the allowed amount of such claim); and (3) with respect to a claim of a kind specified in Section 507(a)(6) of the Code, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of junior to the claims of such impaired, unsecured class will not receive or retain any property on account of that junior claim or interest.

(3) (A) Each holder of an interest will receive or retain on account of such interest property of a value, as of the Effective Date, equal to the value of such interest (no such holder is entitled to a fixed liquidation preference or fixed redemption price, so far as the record reflects), or (B) the holder of any interest junior to the interests of such class will not receive or retain any property on account of that junior interest. The priority of distribution to Holywell creditors pursuant to stipulation does not adversely affect any equally-situated creditors, since all creditors through Class 6 will be paid in full. Accordingly, the Bank's Plan was and is entitled to confirmation.

In accordance with District Judge Atkins' Memorandum Opinion directing remand, the foregoing findings of

fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc.*

DONE AND ORDERED at Miami, Florida, this 10th day of November, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: Counsel and Parties
per attached Service List

APPENDIX 30

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

No. 84-01590

IN THE MATTER OF HOLYWELL CORPORATION, *et al.*,
Debtors.

Adv. No. 76-0906

HOLYWELL TELECOMMUNICATIONS CO. &
HOLYWELL LEASING COMPANY,
Plaintiffs,

v.

THE BANK OF NEW YORK,
Defendant.

ORDER SETTING HEARING ON REMAND

June 15, 1987

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Monday, June 15, 1987, and the following proceedings were had:

* * * *

[108] MR. SHEFTALL: Now, we will turn to the evidence to be proffered by the plaintiffs, HTC and HLC. The first witness the claimants would call would be Mr. Ed Schumacher.

Thereupon:

EDGAR SCHUMACHER

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEFTALL:

Q. Would you please give us your full name, sir?

[109] A. Edgar Schumacher, Jr.

Q. And your professional address is what?

A. 2564-B Ivy Road, Charlottesville, Virginia.

Q. How are you currently employed?

A. Chief financial officer for Holywell Corporation.

Q. Mr. Schumacher, are you familiar with, that is, do you have personal knowledge of the bank's proposed findings of fact as submitted in this remand proceeding?

A. Yes, I have read the document.

Q. Do you have personal knowledge of any facts or circumstances which would controvert any of the factual assertions contained in those proposed findings?

A. Yes, I believe I do.

Q. Would you take a few moments, please, sir, to address each of the proposed findings submitted by the bank as to which you have personal knowledge of facts which would controvert them?

A. Yes. I think the easiest way is to simply go through it. I have made some notations on the pages of their document and I will simply refer to the page number.

[110] Page 5, at the bottom, Paragraph 2, they make the statement that:

> "HLC," meaning Holywell Leasing Company, "was formed to lease equipment to the debtor MCLP."

That is wrong. That company was formed in 1978 to lease equipment to various Washington properties that we had developed at that time, and when we began developing the Miami Center project in 1980 we included in the prospectus the intention for Holywell Leasing to purchase and then lease various equipment to the MCLP project, but it was already a viable entity performing a leasing business prior to MCLP ever being created.

Q. Very well, Mr. Schumacher. Are there any other proposed findings that are erroneous, in your view, based on your personal knowledge?

A. I believe there are several and, for expediency, I will just go through and refer to the pages.

On Page 19 of their documents they make the statement that:

> "MCLP owes Holywell's wholly-owned subsidiary, Pietro Belluschi, Inc., $300,833."

[111] That is incorrect. That is an independently-owned company which did have a valid claim for that amount. We have no relationship to it.

Q. Would you spell the name of that entity for the court reporter?

A. Yes. P-i-e-t-r-o B-e-l-l-u-s-c-h-i, Inc.

On Page 20 of their document and somewhat reiterated again on Page 24, the bank's document refers to what they call inequitable conduct of Gould and cite that:

> "During the 11-month period prior to the filing of the bankruptcy petition that Gould received something slightly—$1 million from Holywell's cash during that time,"

but fails to mention that during the same time frame that Gould loaned to MCLP in excess of $837,000, Holywell Corporation loaned in excess of $3,767,000 to MCLP, and that two subsidiaries, Charleston Center Corp. and PBA, Inc., loaned $2,438,000 to MCLP all during this same time frame and that, further, approximately four-

million-seven of those loans that Holywell and Gould and subsidiaries made to MCLP, that four-million-seven of those funds were [112] immediately taken by the Bank of New York to pay themselves accrued interest and principal on loans outstanding rather than in really being utilized towards the payment of other creditors and help complete the project.

Also on Page 20, a statement is made regarding that Holywelly made a loan of $1,750,000 to Gould on October 14, 1983.

I think the statement is misleading because they don't complete the story in that Holywell Corporation had the opportunity to purchase the 20 percent minority interest owned by Clark Enterprises, and that being advantageous to all of the parties, Gould requested a loan and rather the bank decided, no, we would rather loan the money to Holywell and have Holywell loan Gould the $1,750,000 to purchase the stock, so that Gould then would be the 100 percent owner of all of the stock, and the bank controlled the total transaction from start to finish in terms of the disbursing of the funds and where the funds ended up and the control of all of the collateral involved.

On Page 24 of their submission, they cite as inequitable conduct by Gould:

> "Conflicts of interest resulting from his control of both the lessor and [113] lessee under the HTC/MCLP lease as well as the HLC/MCLP lease,"

and they also represent the Chopin/MCLP ground lease, yet the bank was fully aware of these leases, the bank participated certainly in the Chopin/MCLP ground lease and the language of that lease, approved the language to a substantial extent in the other leases, knew from the very beginning of the project that HLC would be buying and leasing equipment to MCLP, so, obviously, at that time, they never felt there was a conflict from the beginning.

Page 24 as well, Item No. C, 43(c), they mentioned that:

> "The debtor's estate was charged for $2.5 million in IRS penalties for failure to pay withholding taxes."

The actual penalty amount is only $260,000 for the late payment on the withholding taxes.

On Page 30, Item No. 53(a), they mention, they say:

> "In due course a creditor of MCLP could reach various assets,"

and they mention Holywell's assets and then they say:

> "Net of its liabilities."

However, they never made any provision [114] for the plan encompassed those liabilities such as it would include the income taxes that would result from all of the various assets sales that have occurred.

MR. ZIEGLER: Let me make one further objection. We are now into the section of our submission labeled Conclusions of Law and we don't feel that Mr. Schumacher is qualified to testify in regard to conclusions of law. We also have some problem with utilizing the requested submission to the Court as a target for him to take potshots at, but since we have a standing objection to the materiality and relevancy of the entire procedure, I don't think this is an appropriate way to proffer evidence under these circumstances and certainly not as it relates to the section entitled Conclusions of Law.

Q. (By Mr. Sheftall) Please continue.

A. On Page 32, Item 55(a) referencing consolidated financial statements, the bank makes a completely totally erroneous statement and its says:

> "In addition, even the debtor's bi-weekly debtor-in-possession reports were prepared on a conolidated basis during the period before confirmation."

As the bank is fully aware, because they received a copy of every single report prepared, each [115] of the five individual debtors prepared their own bi-weekly re-

ports and issued same to the Bankruptcy Court. There was never a consolidation among any of the five debtors in their reports.

Under Page 33, Item 55(d), the bank says, referring to the inter-company debts:

> "It would require substantial accounting and legal expenditures to investigate and adjust."

That is wrong, obviously, because, as the bank is aware, Touche Ross & Company had audited the statements of both Holywell and MCLP for several years prior to the bankruptcy filing and it would be impossible for them to have issued audited statements if the bank's statement was true:

Item 55(e) says:

> "Gould operated the debtors without regard to their separate identities."

As the bank is aware, that is a false statement. The fact that, once again, the financial statements, audited financial statements could be issued by Touche Ross for Holywell and its subsidiaries, one, is in evidence of the fact that there must have been proper documentation among those entities and has been evidenced by the various documents produced, I [116] think, prior to the bankruptcy, to the bank and subsequent.

Ninety-nine percent of every transaction recorded between any company, be it a subsidiary or an affiliate, was recorded properly on paper, leaving a full audit trail, and was properly recorded in the respective books of entry of the appropriate entity.

They make the statement in the same 55(e) that:

> "Gould testified to numerous pre-petition transfers among the debtors and their affiliates."

Yes, there were transfers, there were loans, advances made to the affiliates, as I have previously indicated just

recently about the substantial sums of money that were loaned to MCLP.

They said that, the same 55(e), that:

> "Gould caused Holywell, for example, to advance $1.75 million to him without the formality of even a promissory note."

There was a promissory note and, of course, the transaction that they are referring to is the $1,750,000 loan to buy the 20 percent interest from Clark Enterprises, and the bank controlled the]117] whole transaction from beginning to end.

55(f) says that:

> "Business functions and assets were co-mingled."

Once again, the bank knows that that is absolutely wrong. They were provided and have seen complete documentaiton that every single business entity was treated separately, had its own separate set of books and its own separate federal ID number, state numbers, all the proper authoritative governmental requirements for filing were done under the individual names of every entity.

Great pains were actually taken to maintain the integrity of each set of books and to be certain of what the respective assets and liabilities were and income and expenses of all the separate entities that were involved.

55(g) says that:

> "The debtors can operate and are operating successfully in a single location,"

which, of course, is only a subsequent event. The debtor Holywell Corporation operated in Washington, D.C., Tucson, Arizona, Charleston, South Carolina, and Miami during the course of its development period, prior to [118] development of the Miami project, and subsequent to the filing of the chapter petition. It is only after the sale of all of the properties that Holywell ended up in a single, at the moment, Virginia location.

Page 34, Item 57, they say:

> "There has been no evidence to substantiate the debtor's claim that substantive consolidation will somehow cost them approximately $17 million in federal income taxes."

As the bank is fully aware, there have been assets sales by Holywell and Gould and subsidiaries that have generated something in excess of $40 million that have been utilized to date within this project and in this proceeding and, as anyone knows in this country, you cannot generate that amount of income from assets sales without incurring an income tax liability.

Page 35, Item No. 58, at the bottom of the page, the bank includes the statement:

> "The need for creditors to file such claims and to trace assets is completely attributable to the labyrinth that Gould has created."

I think that is a misleading statement. [119] As often is done in this country, there are valid business reasons and purposes for creating separate companies to provide certain services and functions and, as an example, the holding company for the Bank of New York is just as valid an example where there is a consolidated parent and several subsidiaries performing different functions and it makes sense and good reason to have a separate company rather than one entity, and that is all that was done and, as I indicated before, there are always, every step was taken to be sure the proper assets and liabilities were recorded for each and every one of the companies.

Q. Mr. Schumacher, you indicated in some of your testimony that the Bank of New York had exercised a degree of control throughout the administration of the loan. Do you have personal knowledge of any other examples of control exercised by the Bank of New York over transactions involving the debtors in this proceeding?

A. Over the period of the loan submissions would be made to the bank regarding requested expenditures. The bank would have to approve every single expenditure before providing any of their funds. At times they would make changes as to what they would approve to be paid. [120] They, at times, would initiate a request to, say, pay their various consultants or some of their attorneys' fees and bring forth a request.

When we arranged assets sales to provide funds to the project, the bank controlled all of the funds that were generated by those asset sales. The asset sales were undertaken by us to provide funds to the project to pay the various subcontractors and other creditors, so that the project could be completed and, again, generating the revenue that it was intended for. The bank's control of these funds from the asset sales, however, was used as I indicated previously.

The majority of it got used to pay accrued interest and principal rather than being really provided to the project to pay off the creditors.

Q. Did MCLP have any control over these disbursements?

A. The disbursements from all of these transactions of either loan funds or asset sales funds were controlled by the bank.

Q. Did the bank impose any requirement that special segregated accounts be maintained?

A. There were segregated accounts for all [121] of the participants in these transactions, the Miami Center Limited Partnership, Ted Gould, Holywell Corporation, 1333 New Hampshire Associates, NHA Corporation, every entity that got involved in an asset sale, the bank would set up an account and the money would flow through those accounts at the Bank of New York.

Q. Did newly generated funds from such asset sales ever reach the project?

A. Eventually, as I indicated before, some of the funds did eventually reach the project. For example,

the Charleston Center sale generated something like about two-million-four of funds and, to the best of my knowledge, approximately only $300,000 to $400,000 of that amount actually reached the project, the remainder going to pay principal and interest and banks' consultants.

Q. So, all but that small amount was diverted by the bank to its own use such as for interest and attorneys' fees?

A. Correct.

MR. ZIEGLER: I have got to object to the form of the question. "Diverted to its own use for the payment of principal and interest," I think, is an unfair characterization. I think Mr. Schumacher [122] admits that there was a debt owed to the bank that needed to be paid.

Q. (By Mr. Sheftall) Would you clarify that for us, Mr. Schumacher?

A. The asset sales were done to generate funds for the project, to get the project completed. The funds from the asset sales were controlled by the bank. The bank took the majority of the funds and paid principal and accrued interest on outstanding loans.

Q. Did the Bank of New York ever prepare and send to Mr. Gould for his signature letters of direction concerning the proceeds of any asset sales?

A. There were some letters and there were extensive conversations, telephonic conversations over the required distributions that had to be made which included the control, the necessary control that the bank demanded had to be there, so that, although the drafting may have occurred in Washington, the gist of the language that was to go in the letters of instruction were generated by the bank, typically the counsel for the bank.

Q. Who was that?

A. The representtaives of the firm of Emmet, Marvin & Martin.

[123] Q. Did the borrowers ever make payroll requisitions?

A. Included in the requisitions made were requests for funds to pay payroll and payroll taxes, and the bank would request that the payroll tax amounts be stricken from the request and resubmit a request for only the net payroll to be involved.

Q. Well, was the bank's request, as you put it, in the nature of a request or a demand or an insistence upon the requisition for payroll taxes to be rejected?

A. I wasn't directly involved. I saw, after the fact I saw requisitions which had gone up with the taxes and then later had to be revised without the taxes. My understanding from the participants involved in the process on the accounting staff in Miami was that it was at the bank's direcion that that be done or otherwise they would not fund.

MR. ZIEGLER: I am going to object and move to strike the hearsay.

MR. SHEFTALL: I have nothing further. Thank you, Mr. Schumacher.

(Witness excused.)

MR. SHEFTALL: The next witness that the plaintiffs call is Mr. Phillip Yaffa.

[124] Thereupon:

PHILLIP A. YAFFA

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEFTALL:

Q. Please give us your full name.

A. Phillip Allan Yaffa.

Q. How are you employed, Mr. Yaffa?

A. I am currently vice-president of Florida East Coast Properties.

Q. Are you an attorney?

A. Yes, I am.

Q. How long have you been admitted to practice law in the State of Florida?

A. I was admitted to practice law in the State of Florida in 1980.

Q. Were you retained to perform legal services for any of the borrowers of funds from the Bank of New York?

A. Yes, I was.

Q. Did you act in any other capacity?

A. I acted as general counsel to Miami Center Limited Partnership and the Miami Center [125] Corporation.

Q. Was that the extent of your retention as a professional attorney in connection with any parties who are participants in these proceedings?

A. We performed a number of functions; whether they were straight legal functions or not, I don't know.

MR. ZIEGLER: May I ask you to clarify, just for purposes of the record, whether he was an in-house employee and general counsel?

THE WITNESS: Yes, I was the Florida general counsel for Miami Center Limited Partnership and Miami Center Corporation.

Q. (By Mr. Sheftall) Mr. Yaffa, do you have any personal knowledge of facts and circumstances having to do with the payment of payroll taxes or the non-payment of payroll taxes in the dealings by the borrowers with the Bank of New York?

A Yes, I do.

Q. Would you take a moment, please, to give us a little background and to state for the record what your personal knowledge entails in that regard?

A. Well, at some point, I believe in early [126] 1983, we began to receive from the Internal Revenue Services notices of non-payment of 941 payroll taxes and assessments and levies and garnishments. As a result of those

notices of the non-payment of taxes, I was directly involved in the negotiations with the Internal Revenue Service in an attempt to resolve those issues and get payment of the taxes due.

Q. Was there any participation or control exerted by the Bank of New York with respect to the need to pay these taxes?

A. Yes, there was. When I received notices, I would forward them, at the request of the bank's counsel, to the bank's counsel. Principally I would deal with an attorney for the bank's firm by the name of Carl Weiss.

Whenever I received a levy or a garnishment or a notice of deficiency, I would immediately forward those notices to Carl Weiss.

In my negotiations with the Internal Revenue Service and in attempting to reach an agreement on the payment of the taxes, I would immediately call Mr. Weiss and inform him of the progress of our meetings, who I was meeting with and, in certain instances, of course, if I did not get back to him and if Carl knew I was having a meeting and I [127] didn't get back to him when he felt it was over, he would call me in Miami to find out the status of the negotiations.

As drafts of potential agreements were entered into, I would forward those drafts to Mr. Weiss for his review and perusal.

Q. Did he require you to do that?

A. Yes, he did.

Q. Whose obligation was it to pay the IRS for payroll tax obligations? Was it the borrower's obligation or the bank's obligation?

MR. ZIEGLER: You may want to withdraw that question—

Q. (By Mr. Sheftall) Do you have an opinion?

A. I believe that the obligation is to the person that employs or makes the funds available for the purpose of paying employees. In our particular situation, at the time these notices and deficiencies were accruing, we had

no liquidity to pay these funds. That fact was made aware to the bank by myself personally and in conversations at which I was present.

The bank was well aware that the direct employer had no funds to pay the payroll taxes.

Part of my responsibilities in working [128] for the limited partnership would be to review invoices to be submitted into bank requisitions and, of course, included in those requisitions would be employee wages. I would approve requisitions for employees to be submitted to the bank of gross payroll requirements, meaning salary plus social security taxes as well as withholding taxes.

Those requisitions would then be sent to the bank and, on a number of occasions, I would receive a call back from lawyers for the bank indicating that they would not pay certain of those obligations that were being requisitioned.

Q. Did the bank's conduct disadvantage the borrowers at all?

A. Well, there is a number of instances where negotiations on obligations that were owed that were in dispute were able to be resolved by agreement between the creditor and the partnership.

For example, the millwork supplier for Miami Center Limited Partnership, a Canadian company by the name of Sophina Industries, was owed a sum of money which, after lengthy negotiations, the amount was agreed upon. In all instances of these negotiations I would keep the bank's attorneys versed into the status of the negotiations and what the issues [129] were and how they were being resolved.

In the Sophina Industries example, we had agreed upon an amount, the bank was aware of the amount, we had entered into an agreement with Sophina Industries for the payment of that amount. When the sums, however, were requisitioned, the bank refused to pay that requisition.

In terms of the tax liability, the amounts, again, of salaries were requisitioned and, in one instance, in a conversation, a telephonic conversation, the bank specifically said they would not pay the employee taxes, that they would only fund the requisition to the extent of the net obligation of the employer.

Q. You mentioned the bank's refusal to approve disbursements and you cited the Sophina Industries example, the company that did the millwork. Were there any other examples that would illustrate the bank's refusal to pay disbursements to those who were trying to complete the project?

A. There were a number of creditors that I would negotiate with. Another one that comes to mind now is the company that supplied the crystal to the hotel, Venini.

There was a dispute as to the amount of [130] the bill owed. There was an attorney representing Venini in New York that I was negotiating with. After lengthy negotiations on the amount of the liability, we had agreed to a sum and I had also kept the bank's attorneys informed on the continuing status of those negotiations.

When those sums were requisitioned and when an agreement was signed based on what I considered to be the good faith position of the bank that they would fund those dollars needed to resolve the differences, I would enter into an agreement with the creditor based on the good faith proffer of the bank that they would pay them.

However, when the funds were requisitioned, the Venini crystal bill, for instance, was not funded.

Q. Do you have personal knowledge of the bank's conduct with respect to the effort to lease the property and with specific reference to non-disturbance agreements?

A. Yes, I do.

Q. What is a non-disturbance agreement?

A. A non-disturbance agreement basically is an agreement to the effect that as long as a tenant fully performs

the obligations of the lease, in the [131] event the landlord's lenders or the mortgage on the property would be defaulted and foreclosed upon and the lender would assume possession of the property, that, provided the tenant was in good standing, the lender would not terminate or would not disturb, in effect, the leasehold interest of the tenant.

Q. What efforts were the borrowers making to obtain profitable leases, to rent out the project?

A. Well, there was a full-time effort by various agents as well as the general brokerage community in Miami to bring tenants to what is a AAA, first-class building in Miami.

The effort was continuous and ongoing up to a point when it became clear to the community in general that tenants that would be going into the Edward Ball Office Building would be going in there at their own risk.

What I mean by that is that the kind of tenants that the Edward Ball Office Building was attracting were, of course, large space users, sophisticated tenants who had spent hundreds of thousands of dollars of their own funds in leasehold improvements within their premises.

Of course, a tenant would not feel [132] secure in spending the kind of money in developing their interior improvements with the knowledge that there was a potential that their lease could be cancelled by a mortgagee taking possession.

Q. What was the significance to the borrowers of its efforts to obtain profitable leases for the project?

A. Well, there were a number of ramifications to getting the leases. First, of course, is the ability to generate cash flow to support the project, pay the debts, keep the project going. Certainly the income that the project was generating was generated from the office building side of the project and the ability to receive those rents was the ability to ultimately complete and operate the property.

In addition, there was a continuing effort on the part of the limited partnership to secure permanent financing for the property. In order to secure permanent financing, we would prepare pro forma rent polls indicating what the potential income was of the property.

The ability to sign a lease that would confirm the dollar amounts of those rent rolls would give that pro forma a higher degree of credibility.

For instance, one of the leases that [133] was just about to be signed for a large space user on two floors of the office building, some 50,000 square feet if I recall correctly, by a local Miami law firm by the name of Fowler, White, et al.—I am sorry I don't remember the rest of their names—if I recall, that lease was a lease that was a $28 a square foot on the fifth and sixth floors of the building.

Those numbers were directly in line with the pro formas that we had been submitting to potential lenders in securing permanent financing.

In negotiations with that firm, the issue of a non-disturbance agreement was always in the forefront.

I would negotiate those leases and then send the lease to the bank's attorney for their approval.

Q. Did the bank require that it approve those leases?

A. Yes, it did.

The negotiations, after negotiating all of the fine points and the legal points and the business points of the lease and preparing the third and final draft for signature, the partner that I was negotiating with in that firm finally said to me [134] directly that unless they had some indication that the Bank of New York would issue a non-disturbance agreement, that he would not even waste his time in reading the final draft after, you know, tens of hours of negotiations of that agreement and, in fact, did not read the agreement and did not execute a lease in the Edward Ball Building floor space, but, instead took additional space in the premises where they were doing business at the time.

Q. Had the terms of that final draft of the Fowler, White lease been negotiated and agreed to?

A. Yes, they had. This was the third draft, this was from the initial submission of, from the negotiation of a letter of intent to the then preparation of a lease, this was now the third draft of that lease that was, all points had been agreed to and had a non-disturbance agreement been issued, the lease would have been signed.

Q. Are there any other examples of the bank's refusal to extend a non-disturbance agreement to prospective valuable tenants of the project?

A. Yes, there are. Two that come to mind are the law firms of Finley, Kumble, et al., and a Florida Bank, Barnett Bank.

In the Barnett Bank situation, they had [135] actually signed a lease, if I recall, it was for $35 a square foot located on the second floor of the building. That was an outstanding retail rate for space on the second floor. It was a windowless space that had no direct public exposure and there was no signage involved for the bank in the building and it was clearly a great lease with a good financial institution at a very good rate. The rate, again, gave credibility in support of the pro formas which we were issuing to prospective permanent lenders.

In that instance, after a long and lengthy negotiation with the bank's attorneys, they had, in fact, signed a lease, but in that lease they did have a right to cancel that lease in the event they could not procure a non-disturbance agreement from the bank within a prescribed period of time.

I was unable to procure a non-disturbance agreement from the bank in that issue, although throughout the negotiations the bank was aware that a non-disturbance was called for and, in fact, dealing with the bank through its attorneys, I was led to believe that I should continue negotiations, that non-disturbance agreements would be forthcoming.

Non-disturbance agreements were not forthcoming and although I was able to receive several [136] extensions of the condition subsequent cancellation date in the lease, ultimately we received notification from Barnett Bank's attorneys that, as a direct failure to provide a non-disturbance agreement, they were exercising their right to cancel in accordance with the terms of the lease and, in fact, did cancel.

In the Finley, Kumble, Wagner, et al., this was a very large user, a user that, in fact, during the course of the negotiations expanded their space requirements, so, at the time the final lease was ultimately signed, I believe we started out at around 25,000 square feet of space, I think it went to 37,000 square feet during the course of the negotiations, and ultimately, shortly after this lease was signed, exercised an additional option for some, almost 50,000 square feet of space. Again, that was a very good rate for the building in light of the market conditions that existed in Miami at the time.

This was a very intensive negotiations in this lease that took place both in Miami and in New York.

The issue of a non-disturbance agreement was in the forefront of these negotiations and to the extent that an acceptable non-disturbance agreement was attached to this lease as an exhibit.

[137] Throughout the course of these negotiations, the Bank of New York as well as the Metropolitan Life Insurance Company, which was going to be a permanent lender for the project, both were continually reviewing the non-disturbance agreements proffered by the Finley, Kumble law firm, would make corrections and would actually negotiate a non-disturbance agreement that was acceptable to all of the parties.

Notwithstanding, again, everyone's good faith effort to finalize these transactions, the lease was signed, again with a condition subsequent within the lease document that provided that in the event that the non-disturbance agreement was not signed, Finley, Kumble had a right

to terminate the lease and, as is the case with Barnett Bank, we felt that the bank breached their good faith to us and did not execute a non-disturbance agreement which ultimatety led to the cancellation of the lease and the tenant taking space in another location.

Q. That is cancellation of the Finley, Kumble lease?

A. Well, yes, in the Finley, Kumble matter there was a number of conditions that had to be met, I believe, for the lease, there was a number of [138] conditions that Finley, Kumble had wanted before they would move into the property.

Q. Mr. Yaffa, as an attorney and one who is personally familiar with the events that you have testified to, can you characterize the bank's conduct with respect to the manner in which it exercised control over disbursements, including those for payroll taxes, and also with respect to its refusal to sign non-disturbance agreements for the prospective tenants?

A. I would characterize the actions as a breach of duty, of good faith and, in fact, acting in bad faith, knowing that, first, the limited partnership had no liquidity, it had no funds to carry on its business.

In terms of the IRS withholding tax matter they were continuously, the bank through its attorneys was continuously versed and aware of the negotiations and the problems that we were experiencing. It had, in fact, partaken behind the scenes in the negotiations of those agreements, were receiving drafts of the agreements for their approval and, in fact, making suggestions and modifications to those agreements.

Based on the time of all of the parties involved and all of the people that would be affected by [139] that, the IRS would delay actions in coming in and taking possession of the assets and, in effect, closing the doors to the project.

They were continuously aware, the IRS was aware that the Bank of New York was the funding source, that the borrower had, the limited partnership had no

funds of its own and insisted, in fact, that the bank be a party to the settlement agreement that was finally agreed upon, I believe, in November of 1983.

However, upon sending that document, that drafts had been received and approved by the bank's attorneys, upon sending that draft to the attorneys, the bank did refuse to sign it and, as a result of the bank's refusal to sign it, the negoiations with the Internal Revenue Service terminated.

In connection with the issuance of non-disturbance agreements, I would characterize that, in my opinion, as a direct breach of contractual obligations that the bank had in accordance with mortgage documents, specifically the May, 1982 mortgage which contained a direct paragraph, I believe it was Article 1.14 that specifically required the bank to issue non-disturbance agreements. Not only [140] was this a breach of contractual obligations, but the fact that the bank would allow the parties to spend the time and effort in negotiating leases and incurring brokerage commissions and incurring time by all the parties involved and requesting leases to approve prior to the issuance of the non-disturbance agreements, in light of all these activities in which the bank partook, their failure to ultimately not issue the non-disturbance agreements was certainly a breach of bad faith as well as a breach of direct contractual obligations.

Q. One last question: Let me ask you to assume that the bank's refusal to approve, to provide funds for the payment of the payroll taxes was contrary to obligations that it had under the law pursuant to the doctrine of net payroll financing, assuming that, sir, if you would, please, would you have an opinion on whether the bank acted fairly with respect to those issues?

A. In my opinion, the bank did not act fairly and, in fact, breached a legal obligation as the provider of funds to pay the employees' salaries, wages and taxes, with the actual knowledge of the bank that funds were being, that their funds were being used to pay wages and

taxes, with that actual knowledge of [141] the bank, I would say the bank acted in contravention of the law as well as in bad faith.

MR. SHEFTALL: I have nothing further.

(Witness excused.)

MR. SHEFTALL: Would everybody like to take a two or three-minute break before we start with Mr. Gould?

(Short recess.)

Thereupon:

THEODORE BENJAMIN GOULD

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEFTALL:

Q. Please state your full name.

A. Theodore Benjamin Gould.

Q. What is your current business address, Mr. Gould?

A. Ednam Professional Center, Charlottesville, Virginia.

Q. How are you currently employed?

A. I am the president of Holywell Corporation.

Q. Do you have personal knowledge of [142] various matters affecting the borrowers or debtors in these proceedings?

A. Yes.

Q. In fact, you, yourself, are an individual debtor, are you not?

Q. Let me refer your attention to the bank's contention that you received $1,750,000. Have you reviewed the proposed findings of fact?

A. Yes, I have.

Q. Are you acquainted with the item that I am referring to?

A. Yes.

Q. Would you tell us what you know, from your own personal knowledge, about the facts and circumstances surrounding those funds?

A. Holywell Corporation had a minor stockholder, Clark Enterprises who initiated litigation, taking a position which would preclude Holywell Corporation in lending funds to the Miami Center Limited Partnership for the completion of the project, and we entered into a settlement agreement with Clark Enterprises for the purpose of purchasing, I did, for the purpose of purchasing its shares at a price of $1,750,000.

[143] The Bank of New York was requested to lend the funds to me to purchase the shares and, as part of the structure of the transaction which they dictated, the funds, in fact, were loaned to Holywell Corporation.

Q. When you say "they dictated?"

A. The Bank of New York dictated. The funds were loaned to Holywell Corporation. Holywell Corporation, in turn, lent the funds to me. Those transaction were evidenced by notes.

The $1,750,000 paid for the Clark Enterprises' shares in Holywell Corporation and the bank received those shares as collateral for the loan transaction. The loan was later repaid as a separate, I believe it was classified in Class 3, the loan plus interest was repaid by the liquidating trustee.

Q. Can you characterize the bank's conduct with respect to the $1,750,000 transaction or the—

A. Well, I would characterize their conduct in attributing in their proposed findings of fact, in attributing inequitable conduct to me as a result of that transaction as being an attempt to commit a fraud upon the court.

They were completely aware of it, of the transaction, they knew what the purpose of the [144] transaction was, they participated in the transaction because they

were concerned about Clark Enterprises suing not only Holywell Corporation but the Bank of New York and, in fact, the June, 1983 release was actually an indemnity to holding the bank harmless for any litigation that could have been brought by Clark Enterprises for a loan that Holywell Corporation made as a result of the sale of some assets.

Q. What was your salary in 1983?

A. My salary and reimburseable expenses were $650,000.

Q. Would you explain the facts and circumstances surrounding your salary in 1983 as compared with contentions that the bank has expressed in these proceedings?

A. The bank, I regret, has taken out of context information produced on schedules that were filed for this Chapter 11 proceeding, it has taken out of context comments that I made at deposition and it has misused the information that was provided for their benefit.

Q. Could you be more specific?

A. Well, as an illustration, the bank has constantly said that either Holywell Corporation or I owned a substantial interest in the Miami Center [145] Limited Partnership based upon the filing of schedules.

The schedules were filed on the basis of a value for the Miami Center Limited Partnership, that is, for the leasehold improvements in Chopin Associates that had been based upon an appraisal prepared by McCune & Associates of $285 million.

My recollection is that the leasehold improvements were appraised at $220 million and the land at $43 million or $44 million.

In fact, my equity interest in the Joint Venture as a general partner was a percentage of one percent and I had a residual interest, and the residual interest of ownership to which they referred resulted from the value placed upon the property by McCune.

In this proceeding what transpired was that the bank submitted an appraisal at $255,600,000, some $30 million less than McCune's initial appraisal and, in that manner, wiped out my residual interest in the property as well as the debtor's, that is, the Miami Center Limited partners' equity in the property.

As far as the reference to $1 million is concerned in salary and reimburseable expenses, that was for a 12-month period prior to the filing of the proceeding and it included substantial costs that were [146] paid to me by Holywell Corporaiton. In fact, all of the funds to which they refer come from Holywell Corporation's operating subsidiaries and the corporation itself in the Washington area. No funds came from the Miami Center Limited Partnership.

Q. What was the amount that you stated earlier for salary and reimburseable expenses?

A. For the year of December 31, 1983, it was $650,000.

Q. So, your testimony is that not all of that was in the nature of true salary, but a substantial portion to reimburse you for costs you had incurred in performing certain tasks connected with the project?

A. That is correct. For example, travel costs associated with coming here, travel costs associated with meetings with permanent lenders, with going to New York to meet with the bank.

Q. The Bank of New York?

A. The Bank of New York, right. Lodging expenses, a very substantial amount of funds were spent traveling all over the world.

Q. In connection with this project?

A. That's right.

Q. Are you personally acquainted with the so-called completion guarantee?

[147] A. Yes. The structure of this transaction is that the Metropolitan Life Insurance Company and Bankers Life originally issued commitments for permanent loan financing of a total of $112½ million.

The Bank of New York approached me, through Mr. Hamilton, about being the lead lender, lead construction lender. We entered into negotiations and, as part of the process, I agreed and Holywell agreed to enter into a completion of construction guarantee. It was a non-recourse loan for leasehold improvements with a completion guarantee, it was specifically related to the construction clause.

What was the completion guarantee meant to achieve, what was its purpose?

A. It was simply meant to be able to satisfy the terms of the commitment that required completion of construction by November 30, 1982, that is, the Metropolitan Life Insurance Company's commitment.

Q. Do you recall the hypothecation and security agreement that the bank referred to earlier today?

A. Yes.

Q. What was the significance or the purpose of that hypothecation agreement?

[148] A. In December, 1980 I entered into negotiations and reached a memorandum agreement with Olympia & York to enter into a joint venture in which I was to receive a return of capital of $15 million as well as approximately $3 million in reimburseable expenses.

In order to induce the bank to allow the substitution of the general contractor to replace George Hyman Construction Company with Morse Diesel, I was required to enter into a hypothecation and security agreement which, in effect, was for the purpose of insuring the guarantee of completion of construction.

Special accounts were set up at the Bank of New York for myself and for Holywell Corporation into which slightly more than $10.1 million in a return of capital and reimburseable costs were deposited by the Miami Center Joint Venture and, in addition to that, Holywell Corporation and I gave the Bank of New York an assignment of our security interests or our equity interests

as additional collateral in the various limited partnerships in which we had invested as partners.

Q. What was the bank's conduct with respect to the hypothecation and security agreement?

[149] A. Well, with the issuance of the hypothecation and security agreement and later assignment and security agreements, the bank totally controlled the project and controlled the funds that were available to the Miami Center Limited Partnership.

The project had been based upon the commitments of the permanent lenders and tripartied buy/sell agreements with the Metropolitan Life Insurance Company and Bankers Life and a private placement memorandum that had been filed with the Securities and Exchange Commission and reviewed and approved by the SEC although it was subject to the exemption.

It was not possible under this transaction to make subordinate loans to the property without the approval of the Metropolitan Life Insurance Company and Bankers Trust and the Bank of New York because the way the structure of the transaction was formulated, Bankers Life would have had a first on the land loan, the fee interest after the ground lease. The ground lease in this transaction is superior to all of the documents. Bankers' land loan would have ben a first on the fee interest, the Metropolitan Life Insurance Company's leasehold loan would have been a first on the leasehold interest, Metropolitan would have had a second on the fee and [150] Bankers would have had a second on the leasehold.

Both commitments required their approval of any subordinate financing and also had, in the case of the Metropolitan Life Insurance Company, had a hold-back for tenant work.

Until May, 1982 there was no additional fiancing for the project and then, by the way, there couldn't be additional equity investments because of the impact that would have had on the limited partnership and the pri-

vate placement memorandum and that is tax consequences as well as the consequences to securities laws.

In May, 1982 when additional funds were required, I entered into negotiations with the Metropolitan Life Insurance Company and Bankers Life to increase their permanent loan commitments, in the case of Bankers Life from $23 million to $31 million and in Metropolitan's case from $89½ million to $113½ million for a total of $144½ million.

That loan transaction had been reviewed and approved and the bank was in contact with the Metropolitan Life Insurance Company and Bankers Life. Through oral conversations and meetings, they were aware of the fact that loan transactions, that is, the [151] increase in the loans had been approved, and so they lent against the future issuance of the commitments of the Bankers Life and the Metropolitan Life Insurance Company additional funds representing the same amount, $8 million in the case of the land loan and $24 million in the case of the leaseholds.

In fact, my recollection is that Bankers Life did not issue its commitment until July, 1982 and the Metropolitan Life Insurance Company issued in December, 1982 during the period of closing negotiations of the permanent loan.

As part of the process, presumably to induce me to persuade Metropolitan Life Insurance Company and Bankers Life to provide this financing, the bank requested and I granted them a participation agreement, as I granted to them as a general partner, a participation agreement that was to be voided in the event the Metropolitan Life Insurance Company issued its commitment.

Metropolitan Life Insurance Company did issue its commitment and the Bank of New York accepted that commitment on a conditional basis on December 31, 1982 during the period of time that we were engaged in negotiations.

Q. There is a letter reflecting that [152] agreement, isn't there?

A. Yes, there is. That agreement, in fact, was as a result of negotiation that occurred earlier, I believe in October, 1982 at One Madison Avenue in which the various participants, that is, the various participating lenders took part, with the Bank of New York and their counsel, and the structure of the transaction is reflected in the conditional acceptance issued on December 31, 1982 reflecting that transaction.

Q. Now, in your narrative response that you have just given us, I believe you covered two or three subjects. You mentioned the completion guarantee, the hypothecation and security agreement and these negotiations for the closing with Metropolitan and Bankers Life. Could you summarize that portion of your testimony, Mr. Gould, by stating for us how you would characterize the bank's conduct with respect to those matters?

A. Mr. Pajednick, who was one of the, was employed as a, I think, junior partner of Emmet, Marvin & Martin, informed me in a straightforward manner that he did not understand why the Bank of New York should agree to take a subordinate position of a $45 million loan for a three-year period to Bankers [153] Life's first and Metropolitan Life Insurance Company's second, if you like, and, to boot, a loan that was non-forecloseable for three years for which interest would accrue during that period of time.

In March, after pursuing negotiations with the Metropolitan Life Insurance Company for several months here in Miami in March, actually March 28, 1983, at a meeting in Atlanta, Mr. Hamilton informed the Metropolitan Life Insurance Company, that is, Mr. Hamilton who was a senior vice-president of the Bank of New York or vice-president of the Bank of New York, informed the Metropolitan Life Insurance Company that there was no purpose in continuing the negotiations because it was not in my interest.

Q. He presumed to speak for you?

A. He presumed to speak for me. He said that these negotiations were not in Ted Gould's interests.

Q. Were those negotiations in your interest?

A. Obviously, anything that would result in a closing of the permanent loan and getting the Bank of New York into a subordinate position was in the interests of the partnership and also in my interest.

[154] Q. Did you feel that he had the right to speak for you on that matter?

A. No, and, in fact, I kept the negotiations open with the Metropolitan Life Insurance Company, unsuccessfully, until, I believe it was September, 1983.

Q. Did the bank use the hypothecation and security agreement as it was intended, that is, as a guarantee for the completion of construction?

A. No, they didn't.

Q. How, in fact, did the bank utilize that agreement?

A. To exercise control over the property and the disbursement of funds for their own benefit and enrichment.

Q. Now, I would like to ask you some questions, Mr. Gould, about alternative financing.

Would you explain to us the facts and circumstances surrounding the request for alternative financing?

A. It was apparent that the Bank of New York would not be prepared to retain a subordinate position as they had agreed with Metropolitan Life Insurance Company. I entered into negotiations, among others, with the Merrill Lynch Mortgage Corporation to [155] do two things:

The hypothecation and security agreement and the assignment of Holywell's interests in the partnerships had an adverse impact upon our ability, that is, Holywell's ability to lend additional funds to the project, so I entered into negotiations with Merrill Lynch Mortgage Company, The Bowery Savings Bank and Home Savings Bank to provide $105 million in mortgage pass-through certifi-

cates, to refinance the three remaining properties that we had in the Washington, D.C. area.

In addition, I entered into negotiations with Merrill Lynch to provide mortgage pass-through certificates in the amount of $225 million for the Miami Center Limited Partnership.

We approached the bank, as a result of the final documentation of the $105 million loan and requested that the bank, pursuant to the requirements of Bowery, Home Savings and Merrill Lynch, release the hypothecation and security agreement and various assignments that Holywell had entered into in return for Holywell's offering to lend an additional $25 million to the Miami Center Limited Partnership.

The Bank of New York, at that time, this is June, 1984, indicated that the only thing that [156] they were prepared to do was, as later reflected in the June 13th, I believe it is, 1984 release which, of course, I had informed the Bank of New York would not actually satisfy the requirements of the lenders in the $105 million transaction, that is, the refinancing of the Washington properties.

In the case of Merrill Lynch's $225 million proposed loan, I entered into, on behalf of the Miami Center Limited Partnership and Chopin Associates, into a loan application with Merrill Lynch on January 5, 1984 and informed Mr. Hamilton of the terms of that negotiation, requested their cooperation, among other things, in paying the payroll taxes and providing the funds to finish construction and I indicated that, based upon the information that I had received from Merrill Lynch, that they proposed to have a loan committee on January 24th to approve this loan commitment application.

On January 23rd the Bank of New York declared a default.

Q. How would you characterize the bank's conduct in connection with those events?

A. The Bank of New York was attempting to acquire the property.

Q. What property?

[157] A. The Miami Center.

Q. The entire project?

A. That is right.

Q. Was that in good faith?

A. I don't think so.

Q. What were the first three notes?

A. The first three notes were the $23 million, the $47½ million and the $42 million notes.

Q. And what was the contract rate for those first three notes?

A. It was the best commercial rate available, that is, the best commercial rate available on loans of a 90-day duration. Fundamentally it was the, I hate to act as a lawyer here, but the same definition as the one used in Kliner v. First National Bank of Atlanta.

Q. And were those rates different from those negotiated on preceding notes?

A. On succeeding notes.

Q. I am sorry, succeeding notes.

A. Yes, beginning with the notes in May of 1982, the announced prime rate was a negotiated basis for the payment of interest.

Q. Did you personally or on behalf of any [158] of the entities that you represented ever consent to or waive the bank's use of its published prime rate?

A. No—you mean waived the use of the contract rate?

Q. Yes.

A. No, we didn't waive it, we didn't consent to it.

Q. You insisted on the one specified in the contract documents?

A. That is correct.

Q. What happened as a result of that?

A. I met with Mr. Hamilton in the presence of the senior partner of Touche Ross who was responsible for auditing our Miami Center Limited Partnership's financial records, and Mr. Cohen informed Mr. Hamilton that

it was not possible for Touche Ross to audit the interest expense allocable to the Miami Center Limited Partnership on the basis of the records that had been provided by the Bank of New York, and I suggested to Mr. Hamilton that he should make their books available for audit by Touche Ross. He, at that time, said there was no problem associated with that.

Q. Then what happened?

A. The bank foreclosed.

Q. And what was the upshot of the disparity [159] between the contract rates and the ones you referred to on the notes?

A. Well, using an index of the General Motors' 90-day rate, it appears that the difference is at least $13 million. That is interesting because the total claims against the Miami Center Limited Partnership, excluding the disputed real estate taxes which, of course, are not a claim at all, were less than $12 million.

Q. Was the bank's conduct with respect to the application of those rates that you did not consent to fair?

A. I believe it had two effects: One is that it insured that there were not adequate funds prior to the closing negotiations with Metropolitan Life Insurance Company and Bankers Life to complete the project and pay all of the outstanding liabilities of the Miami Center Limited Partnership and, secondly, in view of the fact that the total amount of the Bank of New York's loan, including accrued interest outstanding, as of October 31, 1982, was approximately $142 million, based upon the published prime rate, is we have now learned, and the Metropolitan Life Insurance Company and Bankers Life had offered to increase the loan, their loan commitments to [160] $144,500,000, with the Bank of New York agreeing to a subordinate position of an additional $45 million, I think it is clear that their position disadvantaged creditors and damaged the Miami Center Limited Partnership, the guarantors of the loan, Holywell and myself, in a manner that is unconscionable.

Q. To your knowledge, did the bank have either a contractual or legal right to conduct itself with respect to those rates the way it did?

A. Judge Evans in Kliner v. First National Bank of Atlanta describes that as not only a breach of contract and fraud, but also as a breach of good faith, and there is no question in my mind that the circumstances are absolutely similar and the conditions are the same, fraud was committed, good faith was breached and the contract documents were breached.

Q. Did you have any discussions with representatives of the Bank of New York over the bank's refusal to provide non-disturbance agreements to prospective tenants of the project?

A. Interminably, yes, quite a few.

Q. Tell us about those.

A. I was informed not only by the Bank of New York, but other participants, that non-disturbance agreements would not be issued because the issuance of [161] non-disturbance agreements would allow the rental income of the office building to increase, reducing the degree of their control, that is, the Bank of New York's control.

Q. Did you have any discussions with representatives of the bank over the bank's refusal to allow the payment of payroll taxes?

A. I discussed the payroll tax subject with both Mr. Hamilton and Mr. Noone and expressed my concern not only about the non-payment of taxes, but about the possibility that criminal liability was involved.

Mr. Noone informed me that there would be no criminal liability and he also informed me that the bank wasn't concerned about the issue because the IRS had a claim junior in priority to the Bank of New York's and that the Bank of New York would not be concerned about the possibility of the IRS taking over the property and holding it for the Bank of New York.

Q. How did you view, at that time, the bank's conduct with respect to its refusal to extend non-disturbance agreements and its refusal to allow payment of payroll taxes to the IRS?

A. By that time I felt like I was involved in a classical Greek tragedy called The Myth of Sisyphus.

[162] Q. Is that the one where he is attempting to push the rock up the mountain and can't do it?

A. That is correct. The rock in this particular case was the Bank of New York.

Q. Any other testimony for us concerning the conduct of the bank which is relevant to this proceedings?

A. I don't think so. I will hold my guns.

MR. SHEFTALL: That is all I have.

(Witness excused.)

MR. SHEFTALL: I think we are now at the juncture of the afternoon proceeding when we are to proffer various documentary exhibits into the record in accordance with the procedures agreed to by Mr. Ziegler and myself at the outset of this session.

I don't don't want to prolong this program for anybody, if I can make it shorter.

MR. ZIEGLER: I would tell you what I would agree to do is for you to take your exhibits, mark them with the tags in accordance with the Judge's instructions, submit a photocopy of what you are submitting the original tags to us at your earliest convenience tomorrow or whenever is convenient.

MR. SHEFTALL: All right, that is what I had in mind. Let's do it that way. Judy and I can [163] help get the stickers on with the exact numbers, and we will retain a copy of each one for ourselves and a record of what we have given the Court and we will make copies available to the bank tomorrow. Is that all right?

MR. ZIEGLER: Yes, that is what I said.

MR. SHEFTALL: So, we won't be reciting the titles of any exhibits now.

(Thereupon, the foregoing instruments were marked as Plaintiffs' Exhibits Nos. 1 through 43, respectively, in evidence.)

MR. ZIEGLER: These exhibits are being tendered as part of this proffer with our objections as to their relevancy and materiality, but without objection that they are authentic copies of whatever they purport to be.

MR. SHEFTALL: Yes. I don't need to say anything else, the record will reflect what we are doing.

(Thereupon, the hearing was concluded.)

APPENDIX 31

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

JUDGE THOMAS C. BRITTON

No. 84-01590

IN THE MATTER OF HOLYWELL CORPORATION, *et al.*,
Debtors.

CONFERENCE
(IN CHAMBERS)

May 15, 1987

The above-entitled cause came on for Conference in Chambers before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, 51 Southwest 1st Avenue, Miami, Dade County, Florida, on Friday, May 15, 1987, and the following proceedings were had:

APPEARANCES:

HOLLAND & KNIGHT, by IRVING MARK WOLFF, Esquire, Attorneys for the Liquidating Trustee.

MR. FRED STANTON SMITH, Liquidating Trustee.

---

[3] THE COURT: But I have got it on now and I have just explained to Mr. Wolff and to Mr. Smith that I am making a tape of this for the benefit of all three of

us should there ever be a question of what was said here, and the reason I am not having this before the court reporter and in the courtroom is that I think it would possibly cause unnecessary embarrassment to one of the individuals involved and I would like to avoid that if I can.

My purpose in asking you to come here is that, Mr. Smith, I am going to ask you today to replace Mr. Wolff as your counsel and I want to explain to both of you why and what my concern is.

There are two reasons: The first reason is the statements made and the posture taken by Mr. Wolff in his memo which was filed with the Court in your behalf, Mr. Smith, on May 1st, and that is Court Paper 6001.

That memo makes it very clear that Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan which this Court confirmed is defective and that there are other obstacles of a legal nature to his seeing his way clear to carrying out the confirmation order which directed you, Mr. Smith, to implement as [4] liquidating trustee and which I, of course, am committed to, having approved. I differ with Mr. Wolff, but whether I differed or not, I think that the parties to this lawsuit are entitled to a trustee who is advised by an attorney who believes that the order is legally sound and can be carried out. That is point one.

Point two is that I am disappointed, Irving, as I have told you before in the courtroom, with the pace at which we are moving in the liquidation here.

* * * *

[31] [THE COURT]: You mentioned Mr. Gould. There is no pleasing that man, either that or I have utterly wasted the last 40 years I have been spending in this business. There are some people that there is absolutely no doing business with, you simply roll over them or they roll over you, and Gould, in my mind, falls in that category. I don't expect either one of you to do any-

thing other than perhaps preserve a little civility with him and protect his legal rights, but that man has to be blasted out of the way, and to hope for the day when he will consent to everything and, therefore, put himself in a posture where he can never ever criticize, I think is fatuous.

Even if he signed his goddamned name to a piece of paper directing you to do something, he could very easily, and he is the kind of man who would, come into court a year or five years later and sue personally and saying that he was deceived into this and misled into it, there is a pattern that we see of this guy, and I don't think the O&Y [32] people are any better, in my opinion they are a bunch of crumbs and I am not immensely impressed with the bank either, and maybe it is just because I have got a cold and feel bad and I have been suffering with this case, but it is the worst case I have ever had, going the least satisfactorily and there has been the most waste—

• • • •

[33] THE COURT: I do, too. To some extent that is a possibility, but now that we are stuck with three different District Court judges looking over our shoulders and expecting certain things to take place, those things have to be done here. I cannot walk away and leave those unattended to and say, well, take it up with some clown across the street, that is not going to work, and it wouldn't be right if it did, so I am not going to do that.

I am going to hang onto this case until somebody pries me loose, long enough to see to it that the essential issues, the major issues, are decided at least here, and you are in a position where, unless those orders are superseded, you can carry them out. You see, one great strength that the Bankruptcy Court has, as Irving well knows, is that if an order of this Court is not superseded and that order is [34] performed, then it cannot be challenged any further, so that affords great protection, and if we had been able to carry out the entire plan very quickly,

there would have never been an appeal because they couldn't post the bond

• • • •

[38] THE COURT: —the man is a madman, I think, and it is characteristic of you that you go out of your way to be decent to him and treat him like a normal person, but I wouldn't be offended at all if you wrote a letter to him and told him that, "From this point on I ask you to communicate with me only through your counsel," and deal only with his attorney and ignore the guy. Maybe the attorney would be a more responsible person to deal with, he couldn't be any worse, and then if he puts you in a posture that you feel you need protection on, present it to the Court and let me take that responsibility for it, and I think that before we are all through, I am likely to be sued, I mean, this man is crazy, he will do anything.

• • • •

[42] THE COURT: —Herb Stettin, I am going to suggest that you talk to him. Mr. Stettin has had a great deal of bankruptcy experience, he enjoys an ethical reputation and stature in all respects, I think, comparable to Irving and I wouldn't suggest that it is [43] any better. He has the advantage that he is not associated with this case or with any of the parties at all, he has a very active and keen legal mind and has been very successful as a lawyer. He would be immensely candid with you, as Irving, of course, would, and he will give you an opinion, and I have no idea what his opinion will be.

I spoke to him very briefly to ask if he were available if the situation came up and he were called on, and he said he would be very pleased to do it. . . .

• • • •

[48] THE COURT: Well, one thing I have learned about the judicial apparatus and machinery, it is a great respecter of things that are done and things that work,

no matter how screwed up they may be. Take the very question of the entire jurisdiction of this Court. The United States Supreme Court came out with a decision saying that only an Article 3 judge can do what these judges do and, as Irving and I know, today, three years, four years later—

MR. WOLFF: They are doing the same thing they did then in spite of the Supreme Court and in spite of Congress.

THE COURT: —exactly, and if it goes back to the Supreme Court, without any question at all the Supreme Court is going to say it is okay, in other words, they will find a way to do it because it works, it works, and so we have got to make it work. We can't eliminate controversies, we can't eliminate the personalities that are involved—they sure are a problem.

• • • •

APPENDIX 32

ERRORS OF FACT AND LAW

As contained in the opinion of the Eleventh Circuit Court of Appeals entered March 10, 1988 (Godbold, Senior Circuit Judge) 838 F.2d 1547, on Petition For Rehearing And Rehearing En Banc By Appellants And Petition For Rehearing By Appellees (original Opinion June 29, 1987, 11th Cir., 820 F.2d 376).

1. *Error*, App. 43a: "The appellants are five Chapter 11 debtors—an individual debtor, Theodore B. Gould, and four other debtors, owned, controlled, or dominated by Gould."

Fact: The appellants are as follows: (1) Chopin Associates is a general partnership of the Miami Center Corporation and Theodore B. Gould, formed in the State of Florida in 1979, which was owner and lessor of the land underlying the leasehold improvements referred to as the "Miami Center"; (2) the Miami Center Limited Partnership, formed in the State of Florida in 1979, the lessee of the land under a 99-year ground lease, which owned and developed the leasehold improvements, consists of 40 units of limited partnership interests, of which Holywell Corporation owns 10 units and Theodore B. Gould owns 5 units, each unit of partnership interest representing 2.5 percent of beneficial interest, or 99 percent in the profits, losses and cash distribution from the sale of asset, and of which the general partners, Theodore B. Gould and Miami Center Corporation, have a beneficial interest of 1 percent in the profits, losses, and cash distribution from the sale of assets, and a residual interest of 12.12 percent and 47.88 percent respectively upon repayment of the limited partners' capital contribution of $10,000,000 plus accrued annual dividends; (3) Miami Center Corporation, incorporated in the State of Florida in 1979, is a wholly-owned subsidiary of Holy-

well Corporation; (4) Holywell Corporation, incorporated in the State of Delaware in 1976; and (5) Theodore B. Gould, a resident of Albemarle County, Virginia, is the sole stockholder and president of Holywell Corporation. The 15 units of partnership interests in the Miami Center Limited Partnership, owned by Holywell Corporation and Theodore B. Gould, *lack* voting rights concerning major decisions, including the sale of assets, arranging loans, the sale of additional units of partnership interests, and modification of the terms of the partnership agreement.

2. *Error*, App. 44a: "The five debtors filed voluntary petitions for bankruptcy, and the bankruptcy court consolidated the estates. The debtors continued in possession."

Fact: On August 22, 1984, the Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation each filed a separate petition in Chapter 11 of the Bankruptcy Reform Act of 1978 in the United States Bankruptcy Court for the Southern District of Florida in response to the Bank of New York's filing of a foreclosure proceeding on July 27, 1984, lender's malpractices, and the withdrawal of Shutts & Bowen as the Miami Center Limited Partnership's attorney based upon conflict of interest in the foreclosure proceeding. On August 23, 1984, the bankruptcy proceedings were consolidated solely for administrative purposes.

3. *Error*, App. 44a: "The debtors and the bank filed competing reorganization plans. The creditor committees and individual creditors overwhelmingly approved the bank's amended plan and rejected the debtors' plans."

Fact: The Miami Center Limited Partnership, Chopin Associates, Holywell Corporation, and Theodore B. Gould each filed a separate plan of reorganization. The Miami

Center Limited Partnership's proposed plan of reorganization was based upon the sale of the leasehold improvements for *$237,000,000 to* the Hadid Investment Group, immediate payment *in full* of Undisputed Claims in the amount of $10,182,225.71, a reserve for timely filed disputed claims and payment of an allowed amount after notice and hearing, equitable subordination of the Bank of New York's disputed claim in the face amount of $195,086,027.03 plus accrued interest of $18,895,828.92 in accordance with 11 U.S.C. Section 510(a). Chopin Associates' proposed plan of reorganization was based upon the sale of its fee interest in the land underlying the leasehold improvements for *$23,000,000* to the Hadid Investment Group, payment *in full* of timely filed disputed claims allowed after notice and hearing. Holywell Corporation's proposed plan of reorganization was based upon payment in full of Undisputed Claims in the amount of $1,378,740.90, a reserve for timely filed disputed claims and payment of an allowed amount after notice and hearing, determination and payment of federal and state income tax liabilities, and an interim loan to the Miami Center Limited Partnership of $10,000,000 to be repaid from the sale of the partnership's assets.

The debtors' solicitation of the acceptance of each holder of a claim or interest of a class was not required, since each holder of an unimpaired claim is ". . . conclusively presumed to have accepted the plan." *11 U.S.C. Section 1126(f).* By operation of law, the proposed plan of reorganization of each debtor must be deemed to have been accepted, since the only impaired class of claims in each plan was the disputed claim of the Bank of New York and, as of the effective date of each plan, the Bank of New York would have retained under each debtor's plan, a lien on the property, the value of which based upon the Bank of New York's appraisal of $242.1 million, excluding the FF&E, would have exceeded the amount retained in liquidation under Chapter 7. *11 U.S.C. Section 1129*

(a)(7)(ii); Bkrtcy., Certificates of Attorney and Touche Ross & Company on Acceptance of Plan, as amended, May 15, 1985.

The bankruptcy court's finding of fact that "by an overwhelming margin, the creditors (unsecured by the dollar amount of their claims) . . . demonstrated a preference for the bank's plan . . ." and voted to reject each of the debtor's proposed plans [App. 247a, Confirmation Order, August 8, 1985] is false and contrary to the applicable statutory requirements for determination of acceptance of a plan. *11 U.S.C. Section 1126(c), (d), (f) and (g).*

Since *11 U.S.C. Section 1129(a)(10)* specifies that a court shall confirm a plan only if " . . . at least one class of claims that is impaired under the plan has accepted the plan . . ." the Bank of New York's proposed amended consolidated plan of reorganization did not satisfy the statutory predicate for acceptance and should have been rejected, *no* impaired class having accepted the plan.

4. *Error*, App. 44a: "The consolidation of the five estates is for the purpose of allowing all available funds and assets of the estates to be used in accordance with the Bank's Amended Plan . . . to pay all allowed creditor's [sic] claims."

Fact: The Bank of New York's Amended consolidated plan of reorganization defines "substantive consolidation" of the debtors' estates as follows:

> ". . . the property of the estates of the Debtors shall be treated as common assets and the claims of their Creditors deemed Claims against the common assets.
>
> As a result of the substantive consolidation of the Debtors, all claims between and among the Debtors are *eliminated* by this plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and

> MCLP, all claims, if any, relating to or arising out of the Gould FF&E leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors." [Amended Consolidated Plan of Reorganization, p. 13]

As an inducement not to object to substantive consolidation of the debtors' estates and to accept the Bank of New York's proposed plan or reorganization, the Stipulation and Addenda with the Unsecured Creditors Committees of Holywell Corporation, Miami Center Corporation, and Miami Center Limited Partnership, amended "substantive consolidation" as follows:

> "The Holywell creditors are entitled to distribution from Holywell assets *before* distribution from such assets to creditors of other Debtors, and distribution to the Holywell creditors under the Bank's Plan shall be made from the Holywell assets *prior* to distribution from such assets to creditors of other Debtors." [Emphasis supplied; Bank of New York's Stipulation with Unsecured Creditors Committees, April 28, 1985]

In clarifying the meaning and consequences of "substantive consolidation," the bankruptcy court has made the following statements:

> ". . . what we have just talked about . . . is *not* substantive consolidation in the typical or classical sense, it is something different . . . ." [Bkrtcy., Transcript, Adversary Hearing on Substantive Consolidation, Chief Bankruptcy Judge Thomas C. Britton, July 18, 1985]

> ". . . in the consolidation issue we had the unusual feature that all of the . . . general creditors of Holywell were, in effect, granted first priority by a stipulation. Therefore, we didn't have substantive consolidation in the classic sense where there is a complete intermixture of assets and liabilities . . . ."

[Bkrtcy., Transcript, Chief Bankruptcy Judge Thomas C. Britton, August 8, 1985, pp. 3-4]

". . . the issue of what we will choose to call substantive consolidation, the term is perhaps an oversimplification when describing the facts . . . . I became satisfied . . . substantive consolidation in this case . . . resolved around one or two specific classes of creditors and classes of assets. We weren't talking abstractly about substantive consolidation of every conceivable thing on earth. The record ought to reflect that very clearly . . . . Nobody . . . indicated either a necessity for or a concern about substantive consolidation or [sic] the physically owned assets of a corporate subsidiary of a debtor . . . ." [Id., pp. 20-21]

Thus, substantive consolidation is limited to the property of the debtors' estates and a specific class of assets, available cash and pre-petition claims between and among the debtors. *28 U.S.C. Section 1334(d).* The assets of non-filed wholly-owned corporate subsidiaries of Holywell Corporation were *not* substantively consolidated. *In re Beck Industries, Inc.*, 479 F.2d 410 (2nd Cir., 1973); *Matter of William Gluckin Company, Ltd.*, 457 F. Supp. 379, 383 (S.D.N.Y. 1978). Holywell Corporation's liabilities have a priority requiring payment and the establishment of reserves prior to use of Holywell's assets to pay the claims against other debtors.

5. *Error,* App. 44a: "On August 8, 1985 the bankruptcy court considered whether to confirm the debtors' plans or the bank's plan."

Fact: On August 8, 1985, the bankruptcy court confirmed the Bank of New York's proposed amended consolidated plan of reorganization, having deferred the confirmation hearing scheduled for April 29, 1985, without actual or constructive notice, and stated as follows:

> ". . . I have asked my secretary to get the draft of the confirmation order that I have prepared ready as rapidly as possible . . . Let me get that and get it in your hands and give you a chance to study it . . . ." [Id., p. 4]

The bankruptcy court did not consider confirmation of the debtors' plans. Notice for the hearing scheduled on August 8, 1985 was limited to a Complaint for a Declaratory Judgment that the Category "C" and "D" leases were "true" leases.

6. *Error*, App. 44a: "The debtors' major objections to the bank's plan were, first, that the assets were worth substantially more than the bank was willing to pay. Second, the Gould interests objected to the provision for consolidation of estates that had been approved in the July 23 order."

Fact: The debtors' major objections to the bank's plan are as follows:

(a) Article IV, *Means For Execution Of The Plan*, is misleading and did not provide "*adequate means*" for the plan's implementation, causing an estimated deficit of *$42,661,888. [11 U.S.C. Section 1123(a)(3), (5); 11 U.S.C. Section 1129(a)(9)(A), (B), (C), (10), (11);* Bkrtcy, Debtors' Motion To Withdraw From Consideration the Plan of Reorganization of the Bank of New York, Exhibit A, April 11, 1985]

(b) No provision was made for establishment of a reserve for the payment in behalf of Holywell Corporation and Theodore B. Gould's bankrupt estate of federal and state income taxes in an estimated amount of $20,763,841. [App. 204a]

(c) No provision was made for repayment of court-authorized "super-priority" loans in an amount of $4,717,404, plus accrued interest. [Bkrtcy. April 1, 1987]

(d) The Bank of New York's plan of reorganization proposed taking the chattels owned by the Miami Center

Joint Venture and leased to the Miami Center Limited Partnership, without curing defaults *before* the confirmation of the plan. *11 U.S.C. Section 1123(b)(2)*; *11 U.S.C. Section 365(d)(2), (b)(1)*. Without consent, the Bank of the New York ". . . would receive fee title to the FF&E covered by the MCJV FF&E leases as a result of the exercise of the purchase option on the Miami Center Closing Date." Article IV, *Means For Execution Of the Plan*, pp. 18-19; *11 U.S.C. Section 365(c)*; *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510; *Callaway v. Benton*, 336 U.S. 132, 69 S.Ct. 435, 93 L.Ed. 553 (1949); Bkrtrcy., *Bank of New York v. Olympia & York Florida Equity Corp., O&Y Equity Corp., Theodore B. Gould, Miami Center Joint Venture*, June 24, 1985; affirmed S.D. Fla., Case No. 85-3430, June 23, 1986.

(e) The Bank of New York's plan of reorganization proposed to take the furniture, fixtures, and equipment owned by Holywell Leasing Company, leased to the Miami Center Limited Partnership and the telecommunications systems, owned by Holywell Telecommunications Company, a licensed common carrier, leased to the Miami Center Limited Partnership and third parties, without curing defaults *before* the confirmation of the plan. *11 U.S.C. Section 1123(b)(2); 11 U.S.C. Section 365(d)(2), (b)(1)*. The plan proposed conveyance of title *without consent*, and without consideration pursuant to Article IV, *Means For Execution Of The Plan*, as follows:

> ". . . at the closing BNY or its designee would receive fee title to the FF&E covered by the Gould [sic] FF&E Leases, as a result of merger of such leases effected by the substantial consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) . . . ." [p. 18].

Holywell Corporation as the stockholder of Holywell Leasing Company and Holywell Telecommunications Company would be required to exercise constructive ownership of the assets of these corporations for the purpose of adhering to a court-ordered taking of their assets. *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24, 51 S.Ct. 15, 75 L.Ed. 140 (1930); *Schenley Distillers Corp v. United States*, 326, 432, 66 S.Ct. 247, 90 L.Ed. 181 (1946); *Thompson v. Consolidated Gas Co.; Callaway v. Benton, supra*; Bkrtcy., *Holywell Telecommunications Company and Holywell Leasing Company v. Bank of New York*, September 27, 1985; affirmed in part, S.D. Fla. Case No. 85- 3431-CIV-KEHOE, April 27, 1987.

(f) Improper subordination of the claims of the Miami Center Joint Venture, Holywell Telecommunications Company, Holywell Leasing Company, and other affiliated creditors based upon classification as "insiders" without notice and a hearing. *11 U.S.C. Section 510*; *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 698 (5th Cir., 1977); *In re Martin's Paint Limited Partnership*, 12 B.R. 721 (Bkrtcy., N.D. Ga., 1981); 11 U.S.C. section 1129(b); *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir., 1986); *Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. The Bank of New York*, Case No. 85-3230-CIV-ATKINS, March 24, 1987.

(g) In the absence of consolidation of the assets of Holywell Corporation's non-filed solvent corporate subsidiaries as a sham, alter-ego, or based upon a fraudulent transfer of assets and without adhering to state corporate law requiring payment of liabilities before issuance of a dividend to a parent debtor for use in paying claims against the parent or a related debtor, the bankruptcy court lacked subject matter jurisdiction over assets in the amount of $16,296,176 in cash and securities which the Bank of New York's plan improperly proposed to

transfer to the Miami Center Liquidating Trust for payment of claims against debtors. *Sampsell v. Imperial Paper Corp.*, 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 (1941); *In re Walsh Construction*, 669 F.2d 1325 (9th Cir., 1982); *Matter of Paso del Norte Oil Co.*, 755 F.2d 421 (5th Cir., 1985); *Matter of William Gluckin Company Ltd.*, 457 F. Supp. 379, 383 (S.D. N.Y. 1978), citing *Callaway v. Benton, supra* at 495; *In re Beck Industries Inc.*, 479 F.2d 410 (2nd Cir., 1973);; *In re Unishops Inc.*, 494 F.2d 689 (2nd Cir., 1974).

(h) The appointment of a trustee *after* confirmation in whom (1) the assets of the debtors' estates was vested to ". . . hold, liquidate, and distribute such Trust Property according to the terms of this Plan . . .," as specifically enumerated in Article IV, *Means For Execution Of The Plan*, and to whom power and authority of a "receiver" were granted to (2) conduct the business of the debtors and (3) to compromise, settle, and litigate disputed claims. *11 U.S.C. Section 1104(a)*; *11 U.S.C. Section 105(b)*; *Rule 201*, Bankruptcy Act of 1898, as amended to 1976; *In re Martin*, 26 Bankr. 39 (Bkrtcy., S.D. W. Va. 1982); *In the Matter of Gaslight Club, Inc.*, 782 F.2d 767 (7th Cir., 1986); *In re Memorial Estates, Inc.*, 797 F.2d 516 (7th Cir., 1986).

(i) Substantive consolidation of the debtors' estates damages Holywell Corporation and is contrary to the uncontroverted evidence that (1) the assets and liabilities of the various debtors were segregated and consolidated accounting statements had not been prepared; (2) each individual debtor was a separate taxable entity; (3) audits segregated each payable to the Miami Center Limited Partnership's creditors; (4) Holywell Corporation's books and records were maintained in its offices located in Rosslyn, Virginia; (5) the Miami Center Limited Partnership's financial records were maintained and located in Miami, Florida; (6) control of the Miami Center Limited Partnership is exercised by a majority of indi-

vidual limited partners and the partnership interests of Holywell Corporation and Theodore B. Gould lack voting rights concerning major decisions with respect to (i) removal of the general partner, (ii) sale of assets, (iii) arranging loans, (iv) restructuring the partnership, and (v) the sale of additional units of limited partnership interests. [App. 258a]

7. *Error*, App. 45a: "Under the amended reorganization plan that was confirmed a liquidating trustee would be appointed and would take charge of the property."

Fact: The amended reorganization plan states ". . . an individual to be appointed by the Court (and, if requested, after nominations by any party-in-interest) is designated as *Trustee* of all property of the estates of the Debtors . . . including but not limited to the Miami Center, the Washington Proceeds, and all claims and causes of action . . . and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan." [Article V, *Creation Of Trust*, p. 20] On August 12, 1985, the bankruptcy court appointed Fred Stanton Smith as trustee. [App. 251a] The reference to the term "liquidating trustee" is a misnomer. Notwithstanding the plan's terms, Fred Stanton Smith has been referred to as a "liquidating trustee" to avoid the following problems: (a) the trustee's appointment did not satisfy the requirements of 11 U.S.C. Section 1104(a); (b) the powers and authority granted to the trustee are virtually identical to those formerly granted a "receiver" by Rule 201, under the Bankruptcy Act of 1898, as amended to 1976, and the present 11 U.S.C. Section 105(b) specifically states that a "receiver" may not be appointed under title 11; and (c) under case law and private letter rulings of the Internal Revenue Service, a "liquidating trustee" is not a "trustee," "assignee," or a "receiver."

As a "liquidating trustee," Fred Stanton Smith would *not* act as a "fiduciary" in behalf of the debtors, and would *not* be responsible for making the income tax returns and the payment of federal and state income taxes on behalf of the debtors. 26 U.S.C. Section 6012(b)(3), (4); 26 U.S.C. Section 7701; and Bkrtcy., *Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust v. United States of America, Bank of New York, Holywell Corporation, Theodore B. Gould, et al.*, Adv. No. 87-0627-BKC-SMW-A, Transcript, February 11, 1988, App. 204a.

8. *Error*, App. 45a: "The Bank of New York would acquire the Miami Center property from the trustee, together with the furniture, fixtures, and equipment therein, for $255,600, a valuation based upon an MIA appraisal." [1]

> "[1] The furniture, fixtures and equipment had been obtained from affiliates of the debtors pursuant to what the district court, in a separate order had found to be leases."

Error, App. 46a: "The trustee conveyed to the bank's designee, a land trust, title to Miami Center and its furniture, fixtures and equipment."

Error, App. 60a: "The bank bargained for and purchased the FF&E as part of the sale."

Fact: (a) The Contract of Sale, attached as Exhibit A to the Bank of New York's confirmed amended plan of reorganization has a provision granting the following election to the Purchaser at closing:

> "if said FF&E . . . are, for any reason, not obtainable (free and clear of all claims), the Purchaser may, at its sole option, and without risk of default or any liability hereunder (x) cancel this Agreement or (y) proceed with this transaction and thereafter deal with the 'FF&E' in such manner as it may, in

its sole discretion deem appropriate, but in such instance, Purchaser shall be entitled to an abatement in the Purchase Price . . . ." [Paragraph 3(c), p. 5].

(b) The Bank of New York, having retained the right ". . . at its sole discretion . . ." to reject the leases *before* confirmation of the plan, filed a complaint against the Miami Center Joint Venture, alleging that the Category "A" and "B" leases were unperfected security agreements, not "true leases," and the Miami Center Limited Partnership owned the related furniture, fixtures, and equipment, requesting that in the event the bankruptcy court's ruling quieted the Miami Center Joint Venture's title as "true leases" that the court determine "(i) the amount payable to assume each of the leases under 11 U.S.C. Section 365 and (ii) the damages upon rejection of each of the leases under 11 U.S.C. Section 365" [Bkrtcy., April 30, 1985, p. 5; Bkrtcy., *Bank of New York v. Olympia & York Florida Equity Corp., O&Y Equity Corp., Theodore B. Gould, and Miami Center Joint Venture*, Memorandum Decision, June 24, 1985; affirmed S.D. Fla. Case no. 85-3430-CIV-ATKINS, June 23, 1986].

(c) The bankruptcy court granted a declaratory judgment to Holywell Telecommunications Company and Holywell Leasing Company, quieting their title in the Category "C" and "D" leases as "true leases," rejecting the Bank of New York's Answer and Counterclaim seeking a determination that "debtor MCLP (if the Leases are financing agreements) or debtor Holywell (if "true leases") own the property described in the Leases." *Holywell Leasing Company v. Bank of New York*, Memorandum Decision, September 27, 1985; affirmed S.D. Fla. Case No. 85-3431-CIV-KEHOE, April 27, 1987].

(d) The Category "A," "B," "C," and "D" leases were in default *prior to* August 22, 1984, the date upon which

the Miami Center Limited Partnership, as lessee, filed a petition under Chapter 11.

(e) The requirement of curing defaults for assumption pursuant to 11 U.S.C. Section 365(b)(1) was not satisfied before confirmation of the plan.

(f) The Miami Center Joint Venture, Holywell Telecommunications Company, and Holywell Leasing Company, have *not* consented to the sale of their assets.

(g) The lessee's right to demand the lessor's specific performance under the purchase option of the leases was lost and forfeited due to the default in the payment of rent prior to the date of filing.

(h) The Contract of Sale, as amended on October 10, 1985, at the closing, deleted pursuant to the bankruptcy court's rulings quieting title of the Miami Center Joint Venture, Holywell Telecommunications Company, and Holywell Leasing Company, the abatement provision in paragraph 3(c) and limited the modified abatement to $500,000 [Amended Contract of Sale, paragraph 6(c)], and the Purchaser acknowledged that the Miami Center Liquidating Trust, as Seller, conveyed ". . . only such title, items, chattels and matters that it has received by operation of law from the Debtors and Debtors in Possession and that this Agreement is governed by said limitations." [Amended Contract of Sale, paragraph 25]

(i) The Miami Center Liquidating Trust has stated that ". . . as of the date of confirmation, the entities that owned the chattels involved in the A, B, C, and D Leases were *not* the Debtors and, therefore, title in said chattels could not be passed on to the Liquidating Trust"; ". . . title never did pass to MCLP or the Liquidating Trustee' . . . the Liquidating Trustee did not contract to transfer and warrant title in said chattels, because under the provisions of the Code and the record in this case, the Liquidating Trustee was not vested with title . . . With the

amendments to the contract of sale, the Bank knew that only possession of the chattels passed to it."

9. *Error*, App. 45a: "This purchase would be funded through cancellation of the judgment lien held by the bank (approximately $240 million).[2]"

> "[2] In separate proceedings the principal and interest due under the mortgage had been established, and the bank had been granted a final judgment for the amounts."

Error, App. 46a: "The bank gave up its judgment lien, and, in addition, paid approximately $13.6 million of new money, to make up the total consideration of $255.6 million."

Error, App. 59a: "These [the debtors'] prayers for relief must be set against what the bank bargained for, and received, as part of the reorganization plan, and the consequences to the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at 'good standing' interest rates ['published prime rate'], by agreeing to this calculation the bank surrendered a claim of $5 million-$6 million of interest at default rates . . . If the sale goes for naught, the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million."

Fact: Construing the provisions of a confirmed plan contrary to applicable statutory requirements is "absurd" and "totally ineffectual." *In re Sago Palms Joint Venture*, 39 B.R. 9 [Bkrtcy., S.D. Fla., 1984] Although Article IV, *Means For Execution Of The Plan* states that the purchase price of $255,600,000 in payment for the

Miami Center would be paid by granting the Bank of New York a credit in ". . . the amount of the BNY debt plus expenses to the Miami Center Closing Date . . . [and] BNY would pay the balance of the purchase price in cash . . ." and the bankruptcy court entered a judgment determining the amount, validity, and extent of the Bank of New York's lien [App. 186a], granting the Bank of New York a credit of unmatured post-petition interest of $27,050,115 to the Miami Center's Closing Date must be construed as payment in the equivalent of cash, allowable, *if, and only if,* the Bank of New York's claim was ". . . secured by property the value of which . . . is greater than the amount of [its]claim." *11 U.S.C. Section 506(b)*; *Sexton v. Dreyfus*, 219 U.S. 339, 31 S.Ct. 256, 257, 55 L.Ed. 244 (1911); *Vandston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S.Ct. 237, 95 L.Ed. 162 (1947); *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, Case No. 86-1602 —— S.Ct. ——, 1988; *In re Walsh Construction*, 669 F.2d 1325 (9th Cir., 1982); *Johnson v. Norris*, 190 Fed. 459 (5th Cir., 1911); *Liberty National Bank & Trust Co. v. George*, 70 B.R. 312 (W.D. Ky., 1987); *Collier on Bankruptcy*, Section 502.02 (15th Ed., 1984). Thus, since the Bank of New York's ". . . claim is undersecured . . ." [App. 246a] and 11 U.S.C. Section 1141 discharges a debtor upon confirmation

> ". . . from interest liability to the date of payment inasmuch as it relates back to the filing date and, therefore is extinguished with the principal debt . . . [under the 1978 Bankruptcy Code and the 1898 Act] interest was only an incident of a debt . . . . Interest, therefore, would not survive the debt from which it stemmed and if the debt was extinguished, so also was any interest relating to it." *Collier*, Section 502.02 (15th Ed., 1984),

discussing *Johnson v. Norris* (5th Cir., 1911), notwithstanding the bankruptcy court's prior judgment, determining the amount, validity, and extent of the Bank of New York's lien, including ". . . accrued interest on the loans, *determined by the Bank*, at the 'contract (good standing) rate'," a provision of the plan can not be construed as granting the Bank of New York a credit as the cash equivalent for unmatured post-petition interest to the Miami Center's Closing Date in payment of its Class 2 ". . . secured Claim of BNY for the BNY Debt," as defined in Article III, *Treatment Of Claims. 11 U.S.C. Section 502(b)(2); 11 U.S.C. Section 506(b).*

10. *Error*, App. 45a: ". . . the bank agreed to release to the trustee $30 million realized from the sale of unrelated property located in Washington, D.C. that had been owned by some of the debtors; this cash was additional collateral held by the bank and subject to its lien."

    Error, App. 46a: ". . . [the Bank of New York] released the $30 million of additional cash collateral."

Fact: (a) The debtors did not own the property sold in Virginia and Washington, D.C. The Sellers were Twin Development Corporation, a Virginia corporation, 1300 North 17th Street Associates, a Virginia limited partnership, 1616 Reminc Limited Partnership, Eleven DuPont Circle Associates, a District of Columbia limited partnership, and DuPont Land Associates, a District of Columbia limited partnership. The debtors Holywell Corporation and Theodore B. Gould were not "Sellers." None of the Sellers were debtors and the assets of the Sellers were *not* the property of the debtors as of the commencement of the proceeding, or thereafter. Holywell Corporation and Theodore B. Gould as partners owned mi-

nority interests in each of the limited partnerships. Holywell Corporation is the parent of Twin Development Corporation, a wholly-owned corporate subsidiary.

(b) The Bank of New York's lien was additional collateral limited to ". . . the net proceeds due Gould and Holywell from the sale of the Washington Properties . . ." [App. 223a]

The sale proceeds were distributed as follows:

Theodore B. Gould	$ 4,331,157
Holywell Corporation	12,303,869
Other general partners as a class	5,493,254
Other limited partners as a class	22,756,139
Holywell subsidiaries	15,834,692

The above cash distribution was segregated in accordance with the bankruptcy court's order of December 11, 1984, reaffirmed in the Cash Collateral Order, the funds being deposited and invested in accounts of Theodore B. Gould, Holywell Corporation, and Twin Development Corporation at the Florida National Bank. The funds were *not* held by the Bank of New York. The Bank of New York had a lien on Gould's interests in Holwell Corporation, represented by his ownership as sole stockholder of Holywell, and Holywell Corporation's interests in its ownership of the common stock of its corporate subsidiaries. The Bank of New York's lien did *not* extend to the assets of Twin Development Corporation or Holywell's other subsidiaries.

Insofar as the debtors' tax liabilities are concerned, the bankruptcy court's Cash Collateral order stated, in relevant part, as applied to the amount of the Bank of New York's lien:

> "It will be necessary for Holywell to continue to provide these [administrative support] services until such time as the affairs of the companies, their partners, and limited partners ["Sellers"] are terminated and all obligations to the Internal Revenue Service are determined and paid."
>
> "Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of these proceeds." [App. 224a]

Thus, the Bank of New York's cash collateral was *not* $30 million, and the purchase of the Miami Center for an amount in excess of its claims filed against Holywell Corporation and Theodore B. Gould represented a release of its lien, stated, in relevant part, as follows:

> "Upon the passing of title of Miami Center to BNY, BNY's lien and the security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan [$1,750,000 plus accrued interest . . ." [Bank of New York's Amended Consolidated Plan of Reorganization, Article IV, *Means For Execution Of The Plan*, pp. 18-19]

The Bank of New York's proposed reorganization plan made no provision for the payment of the debtors' federal and state income taxes. [App. 208a, 209a, 213a, 215a] No provision was made for the payment of the liabilities of Holywell's non-filed corporate subsidiaries. No dividend was made by Twin Development Corporation or Holywell's other subsidiaries to the parent. No dividend was issued by Holywell Corporation to Theodore B. Gould.

11. *Error*, App. 45a: ". . . the bank was required to set aside $14 million, backed by surety bonds, to

> protect the rights of creditors affiliated with Gould, who had been found in a separate order to be lessors of equipment and fixtures . . . that had been included with the sale to the bank."

Fact: The Bank of New York, as the appellee in *Olympia & York Florida Equity Corporation and Miami Center Joint Venture v. The Bank of New York*, Case No. 85-3230-CIV-ATKINS [October 4, 1985], the Miami Center Joint Venture's appeal of the bankruptcy court's confirmation order confirming the plan's subordination of the Miami Center Joint Venture's claim and the proposed taking of its property *without* consent, was required to preserve and protect the Joint Venture's financial interests with a *$15 million* supersedeous corporate surety bond, the district court having concluded that the merits of the Miami Center Joint Venture's appeal was compelling. [*Callaway v. Benton, supra*, , holds, in relevant part, as applied to this case:

> "The statute does not, however, give the . . . court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property . . . The plan of reorganization in effect hands [the lessor] a contract of sale. Whether or not [the lessor] signs the contract must depend not only upon its business judgment, but also upon the charter of the . . . [partnership] and laws of the state of its . . . [organization]" 336 U.S. at 141.

The Miami Center Joint Venture did not consent to the sale of its furniture, fixtures, and equipment. It initiated a rent and replevin action against the City National Bank as trustee, and M. C. Holdings Partners, the Bank of New York's assigns and successors, alleging that the defendants are liable for quantum meruit damages from October 10, 1985, having exercised dominion and physical possession, and seeking to recover physical possession of

the Joint Venture's personal property. [March 26, 1987] The district court has affirmed the bankruptcy court's order finding that title to MCJV's furniture, fixtures, and equipment passed to the Bank of New York's designee based upon the plan's provision requiring the Trustee in the sole discretion of the Bank of New York to exercise the lessee's purchase option and convey title [Exhibit , *Miami Center Joint Venture v. Bank of New York*, Case No. 87-1317-CIV-ATKINS, *Miami Center Limited Partnership v. Bank of New York*, Case No. 87-1583-CIV-ATKINS, April 4, 1988]

12. *Error*, App. 45a: "Should the bank ultimately have to pay the lessors for the FF&E under arrangement it would be entitled to seek reimbursement from the estate pursuant to a trustee's certificate."

    Error, App. 60a: "Because litigation was in progress . . . whether title to the FF&E was in the lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk."

Fact: The Second Amendment's Funding Agreement states:

> "If a Final Order . . . is entered determining that the MCJV FF&E Lease Claim is entitled to payment prior to or concurrently with the Class 1 through Class 6 creditors' Allowed Claims as set forth in BNY's Amended Plan, BNY will advance to the

> Trustee, within 10 days after written request therefore, the difference between the amount of such claim as determined by the Final Order and the amount of funds available to the Trustee after payment to, and/or provision for all Allowed Claims in Classes 1 through 6 of BNY's Amended Plan which were filed by the bar date (January 15, 1985). In no event shall BNY be required to advance more than $14,417,679 ("the Commitment Amount") hereunder."

The Second Amendment also modified the Bank of New York's proposed reorganization plan, providing in the event that, pursuant to the Funding Agreement, the Bank advanced funds to the Trustee to pay the MCJV Lease Claim, the Trustee would grant a Trustee's Certificate of the Bank of New York, secured by assets of the consolidated debtors' estates, and *subordinate* in priority to Class 6 unsecured creditors' claims.

The district court, in requiring that the Bank of New York secure the Miami Center Joint Venture's claim with a $15 million corporate surety bond, concluded that a trustee's certificate failed to protect and preserve MCJV's rights, concluding that the merits were compelling in the Joint Venture's appeal in the subordination of its claim. App. 227a.

The district court's requirement that the Bank of New York, as appellee in the Miami Center Joint Venture's appeal of the subordination of its claim, preserve and protect MCJV's financial interests with a corporate surety bond, must be construed as a penalty for improperly subordinating the Joint Venture's claim and not providing adequate means for the plan's implementation.

On *October 10, 1985*, the Bank of New York amended the Second Amendment's Funding Agreement to provide for the Trustee's issuance of a "Liquidating Trustee's

Certificate" in event that ". . . BNY be required to pay and discharge the MCJV FF&E lease claims from any source other than under this Funding Agreement for any reason whatsoever, including but not limited to court order . . . it shall be entitled to receive a Trustee's Certificate . . . ." The Funding Agreement was amended post-confirmation without notice, hearing or court approval. *11 U.S.C. Section 1127(b)*; Article XII, *Modification Of The Plan.*

13. *Error*, App. 45a: ". . . the plan provided that certain creditors affiliated with the Gould interests would be 'equitably subordinated' to claims of other creditors because these Gould-affiliated creditors were 'insiders'."

Fact: The Bank of New York's plan subordinated the claims of the Miami Center Joint Venture, affiliated creditors, and pre-petition claims of Chopin Associates, Holywell Corporation, and Theodore B. Gould against the Miami Center Limited Partnership based upon a process of "classification," construing 11 U.S.C. Section 1122(a) as the basis for the subordinate treatment of "insider's" claims.

The district court has concluded [App. 144a]

> "while the Bank feels the classification structure fulfills all of the code requirements, I disagree. Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. *Scherk v. Newton (In re Rocky Mountain Fuel Co.)*, 152 F.2d 747, 750-751 (10th Cir., 1945); *Seidel v. Palisades-on-the-Desplains (In re Palisades-on-the-Desplains)*, 89 F.2d 214, 217 (7th Cir., 1937), *11 U.S.C.A. Section 1129(b)* (1979)."

". . . classification principles cannot be employed to the effectuate the subordination of valid claims. See *In re Martin's Paint Limited Partnership*, 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. Section 1129(b)."

". . . the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim . . . (' . . . a valid claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to be treated equally.')" ". . . the insider label is *not* sufficient, in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. See Estes at 731; Multiponics at 713; Huffman at 212."

The Bank of New York's Disclosure Statement did not allege misconduct. Although the bankruptcy court adopted *in toto* the Bank of New York's proposed findings of fact, amending the Confirmation Order *nunc pro tunc*, the findings of fact, alleging that Olympia & York and Theodore B. Gould engaged in misconduct, were not based upon the testimony of witnesses, physical or documentary evidence. The district court, having concluded that "the plan, as structured, is not fair and equitable to the class 7 creditors," reversed the amended confirmation order. App. 159a.

14. *Error*, App. 46a: "The trustee began making payments to 400-plus creditors of the five estates."

Fact: 634 claims were filed against the Miami Center Limited Partnership, of which 23 were disputed, includ-

ing the amount, validity and priority of the Bank of New York's loan in the face amount of $195,086,026.03 plus accrued interest in the amount of $18,895,828.92; 538 allowed claims, in an amount of $5,000 or less and total amount of *$485,002.95*, represented 80 percent of total claims, and timely-filed Undisputed Claims, including settlement of disputed claims, have been paid in full plus accrued interest of $1,457,075 in an amount of *$17,966,180*, including administrative expenses of $3,606,439; 59 claims were filed against Holywell Corporation, of which 2 were disputed, and timely-filed claims have been paid in full plus interest in an amount of *$1,576,161*; and 5 claims were filed against Theodore B. Gould, of which 2 were disputed, and timely-filed claims have been paid in full plus interest in an amount of *$3,529,916* and a reserve of *$648,050* has been established for disputed income taxes for the years 1975-1979.

The trustee's immediate payment of Undisputed Claims was based upon the Stipulation and Addenda with the Unsecured Creditors' Committee of Holywell Corporation, Miami Center Limited Partnership, and Miami Center Corporation, amending the Bank of New York's consolidated plan of reorganization, filed on behalf of the debtors. In the Stipulation and Addenda, the Bank of New York, as an inducement to the unsecured creditors, assumed the risk of appellate reversal of provisions of the plan construed contrary to applicable statutory requirements and case law by modifying the definition of the Plan's "Effective Date" from "the date upon which the Order of Confirmation is no longer subject to appeal . . ." to "the date of confirmation," thus allowing payment in full of "Undisputed Claims" immediately after the modified "Effective Date." The bankruptcy court approved the Stipulation and Addenda without notice or hearing, concluding that these numerous material amendments did not damage the debtors, notwithstanding the provision for the payment of interest to unsecured creditors:

"The Liquidating Trustee . . . shall be directed by this Court (a) to pay all 'Undisputed Claims' as set forth in the order of this Court [Bkrtcy., April 11, 1985] *immediately* after title to the Miami Center project is vested in the Bank or its nominee pursuant to the Contract of Sale attached to the Bank's Plan (on or before a date forty-five [45] days after the Effective Date), and (b) to pay all Allowed Claims with interest at the full legal rate, *if available* in the liquidating fund, provided that such interest shall be paid *90* days after the payment of the principal." [Amended Consolidated Plan of Reorganization, Stipulation, paragraph 4]

In fact, with the Bank of New York's approval, the Trustee simultaneously paid the principal and interest of Undisputed Claims in Class 1 through 6 immediately after the modified "Effective Date," notwithstanding the lack of adequate means to pay the "super-priority" loans, administrative expenses, and federal and state income taxes.

15. *Error*, App. 47a: "The district court (Sidney M. Aronovitz, D.J.) held that the consolidation and confirmation orders were 'intertwined and independent' [sic] and that the order approving the plan of reorganization "includes inferentially the effect of the [earlier] Order of Substantive Consolidation.' With respect to both orders, however, the court held that the bankruptcy court had failed to enter sufficient findings of fact and sufficient explanations of its legal reasoning to support adequate appellate review."

App. 48a: ". . . the district court concluded that the appeal of the consolidation order was not moot because it was not an order of sale, and because, after remand, should . . . [the district court] rule in favor of debtors on their appeal of the consoli-

dation order, the court could grant meaningful relief to them by reversing that order and "that portion of the confirmation plan of reorganization which incorporates this order'."

App. 48a: "Nor did [the district court] ". . . speak to its holdings that the consolidation order, though standing alone was not an order approving the sale of property, was an order 'involved with the sale' and indeed was 'intertwined and interdependent'."

App. 46a: ". . . the court noted that the purchaser was a designee of the bank and within its jurisdiction, and it analyzed its ability to give 'effective relief' by considering whether it was capable of undoing what had been done."

App. 49a: "The court stated that it could reverse its subordination of debtors' claims and return them to their pre- confirmation status."

App. 49a: ". . . it could require the trustee to reinstate the separate suit that debtors had filed."

App. 49a: ". . . it could review alleged procedural flaws in the valuation proceedings leading up to the confirmation and in other unspecified proceedings."

Fact: In denying the Bank of New York's motion to dismiss the debtors' appeal on the grounds of mootness and stating that "where a bankruptcy court's order concerns matters other than the sale of property, the mootness doctrine may not apply, [App. 78a], implicit in the district court's analysis is that the scope of the court's appellate jurisdiction, as set forth by Congress in 28 U.S.C. Section 2106, is as follows:

"The Supreme Court or any other court of appellate jurisdiction may affirm, *modify*, vacate, set aside or

> reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances." [Emphasis supplied]

The district court properly concluded that as a court of appellate jurisdiction it could reverse the bankruptcy court's Order of Substantive Consolidation and modify the Confirmation Order, stating, in relevant part, as follows:

> "The order regarding substantive consolidation is clearly not one approving a sale of property; rather, it requires that the estates of the five debtors be combined to facilitate payments to their creditors."
>
> ". . . it can grant meaningful relief to the appellants by reversing the order [substantive consolidation] and that portion of the confirmed plan of reorganization which incorporates this order."
>
> "The greater part of the present appeal concerns the Final Order of Confirmation and specific aspects thereof: the equitable subordination of certain *creditors'* claims, the requirement that the liquidating trustee dismiss the appellants' civil suit, the validity of the estate valuation upon which the plan is based, and *the alleged* procedural deficiencies in the conduct of the *confirmation proceedings.*" [Emphasis supplied]
>
> "A crucial determination to be made is whether, accepting various actions have been taken by the liquidating trustee in reliance on the bankruptcy court's confirmation order, can effective relief be granted to the appellants should this Court decide . . . that their appeal has merit? In determining

that it is capable of granting such relief, this court has considered each of the points raised by the present appeal."

"Reversal of the bankruptcy court's ruling on the equitable subordination of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, Inc. would likewise return these entities to their pre-confirmation status; here, this would result in the three creditors being given the higher priority for their claims accorded to 'arm's length' creditors."

"Denial of the liquidating trustee's authority to dismiss the appellant's district court suit would simply allow the action to remain viable. . . ."

". . . review of the alleged procedural flaws in the valuation and other [confirmation] proceedings below would, at most, necessitate further hearings on those matters."

Without having provided "adequate means," the feasibility of the Bank of New York's plan of reorganization for the debtors relied upon substantive consolidation, subordination of the claims of the Miami Center Joint Venture and affiliated creditors, and the creation of the Miami Center Liquidating Trust.

Substantive consolidation of the five debtors' estates damaged Chopin Associates, Theodore B. Gould, Holywell Corporation, the United States of America, and the Commonwealth of Virginia, eliminated valid claims of "insiders" and reduced the federal and state income tax liabilities of Holywell Corporation and Theodore B. Gould as a source of funds for the payment of the Bank of New York's post-petition interest and third-party allowed claims.

15. *Error*, App. 52a: ". . . in most respects creditors had not objected to consolidation . . . the debtors

would not be substantially prejudiced by consolidation . . . ."

Fact: Substantive consolidation eliminates valid Undisputed Claims of Chopin Associates in the amount of *$2,187,236* for pre-petiiton ground rent, payable by the Miami Center Limited Partnership under a 99-year Ground Lease, reviewed and approved by the Bank of New York; Holywell's pre-petition loans in the amount of *$3,837,039.98* to the Miami Center Limited Partnership; Theodore B. Gould's pre-petition loans in the amount of *$3,697,433.00* to the Miami Center Limited Partnership; the rent and rejection damages in the amount of *$3,175,541.30* payable to Holywell Telecommunications Company and Holywell Leasing Company pursuant to the Category "C" and "D" leases, reviewed and approved by the Bank of New York; reduces Holywell Corporation's income tax liability payable by the Trustee to the Internal Revenue Service for the fiscal year ending July 31, 1986 from *$12,822,019 to $3,656,240*; and reduces Holywell Corporation's income tax liability payable by the Trustee to the Commonwealth of Virginia for the fiscal year ending July 31, 1986 from *$627,635* to *$131,425*.

Subordination *eliminates* valid Undisputed Claims of Class 8 "affiliated" creditors in the amount of *$7,235,479*, since the Bank of New York's amended consolidated plan of reorganization of the debtors did not require the Trustee to establish a reserve for the payment of federal and state income taxes in an estimated amount of *$20,763,841*, including the tax liability of Theodore B. Gould's bankrupt estate, made no provision for the repayment of court-authorized "super-priority" loans in the amount of *$4,717,404.96* plus accrued interest, and adequate reserves have not been established for the Trust's liability for priority claims including legal fees.

Effective relief upon reversal of substantive consolidation can be granted to Holywell Corporation, the United

States of America, and the Commonwealth of Virginia without rescinding the sale of the land, leasehold improvements, and Miami Center Limited Partnership's chattels for $255.6 million to the Bank of New York's designee pursuant to the Amended Contract of Sale, October 10, 1985 for the following reasons:

(a) The Trustee's implementation of the Bank of New York's amended consolidated reorganization plan for the debtors was based on reliance upon the Bank of New York's Letter of Indemnity, October 10, 1985, in which ". . . the Bank of New York . . . indemnifies and agrees to hold harmless Fred Stanton Smith as Liquidating Trustee under the Miami Center Liquidating Trust for any claims against said Liquidating Trustee, as a result of the execution of the Contract [and] . . . any other provisions of the Plan."

(b) The Bank of New York's MAI appraisal, including leased furniture, fixtures and equipment, was $19.4 million *less* than the Miami Center Limited Partnership's MAI appraisal, causing the Bank of New York's claim to be "*undersecured*," and thus, post-petition interest of $27,050,115 was not payable. *11 U.S.C. Section 506(b).*

The Amended Contract of Sale must be construed as a transaction independent of the plan of reorganization defining the terms for the payment of the claims of creditors.

Since the Trustee's payment of claims against the Miami Center Limited Partnership is $17,966,180, redistribution of the net sale proceeds in accordance with proper legal priorities and restitution of the assets of Holywell Corporation's non-filed corporate subsidiaries would represent meaningful effective relief, providing the source of funds for payment of liabilities including federal and state income taxes.

Effective relief upon reversal of subordination can be granted to the Class 8 "affiliated" creditors based upon redistribution of the net sale proceeds without rescinding the Trustee's payment of third-party claims.

16. *Error*, App. 50a: "On remand, on the consolidation issue, the bankruptcy court conducted a hearing, took evidence, and heard argument. On the confirmation issues it invited evidence. None was tendered . . . ."

Fact: In the district court's *Order Of Remand And Denial Of Motion To Dismiss*, December 30, 1985, the pertinent findings of fact were as follows:

> "It is clear from the record on appeal that . . . the bankruptcy judge never made the findings of fact necessary to satisfy the requirements . . . for equitable subordination and substantive consolidation."
>
> "There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded."
>
> ". . . findings and conclusion are almost non-existent or absent."

In discussing the bankruptcy court's duty to conduct an adversary hearing and impartially review evidence in response to the district court's instructions on remand, Chief Bankruptcy Judge Britton made the following statement:

> ". . . I am not, at this moment, intending to adopt any finding which is predicated on any new evidence received. Therefore, the finding that I would adopt would be merely findings undertaking to comply with Judge Aronovitz' instructions, making more explicit, more definite and rephrasing that which I undertook to express earlier, but not on any new evidence." [Bkrtcy., Transcript, January 27, 1986]

No documentary or physical evidence was introduced and there was no testimony of witnesses based upon which the bankruptcy court could make credibility determinations concerning substantive consolidation, although the burden of proof was upon the Bank of New York (a) to establish in the absence of substantive consolidation that as the proponent of consolidation of the debtors' estates, the Bank of New York and third-party creditors would be damaged, and (b) to satisfy the "Vecco factors" cited by the district court as prerequisite criteria for implementation of the extraordinary remedy of consolidation, including as follows:

> "1. The presence or absence of consolidated financial statements.
>
> 2. The unity of interests and ownership between the various corporate entities.
>
> 3. The existence of parent and intercorporate guarantees on loans.
>
> 4. The degree of difficulty in segregating and ascertaining individual assets and liabilities.
>
> 5. The commingling of assets without formal observance of corporate formalities.
>
> 6. The commingling of assets and business functions.
>
> 7. The profiability of consolidation at a single physical location."

No documentary or physical evidence was introduced and there was no testimony of witnesses based upon which the bankruptcy court could make credibility determinations concerning equitable subordination of the Class 8 "affiliated" creditors, although the burden of proof was upon the Bank of New York to satisfy the "*In re Mobile Steel*" criteria, as binding precedent of the Eleventh Cir-

cuit, cited as tests by the district court, including the following:

> "1. The claimant must have engaged in some type of inequitable conduct.
>
> 2. The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
>
> 3. Equitable subordination of the claim must not be inconsistent with the provision of the Bankruptcy Act."

17. *Error*, App. 50a: "The bankruptcy court entered lengthy findings and conclusions[4] . . ."

> "[4] In this court, as in the district court, the debtors question the bankruptcy court's having adopted *in toto* proposed findings and conclusions submitted by the bank. The bankruptcy judge asked, and received, proposed findings from the debtors and from the bank. He adopted those from the bank. Debtors question this procedure (as has this court, *Cabriolet Porsche-Audi, Inc. v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir., 1985), but this does not render the findings and conclusions invalid. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985). The district court examined the findings under the plainly erroneous rule and affirmed them. We review them as relevant to the mootness issue. Examining them in that constricted scope, we find no error."

Fact: The bankruptcy court's adoption *in toto* of the Bank of New York's proposed findings of fact and conclusions of law concerning substantive consolidation,

equitable subordination, the plan's substantial consummation, and the Bank of New York as a "good faith purchaser" without the testimony of witnesses, physical or documentary evidence was conduct violative of due process of law and nullified the rules of procedure formulated for trial without a jury. Fed. R. Civ. P. Rule 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 94 L.Ed. 2d 518 (1985); *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, 84 S.Ct. 1044, 1047-1048, 12 L.Ed. 2d 12 (1964); *U.S. v. Marine Bancorporation*, 418 U.S. 602, 615 n.13, 94 S.Ct. 2856, 2866, n.13, 41 L.Ed. 2d 978 (1974); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir., 1975); *Cuthbertson v. Biggers Bros.*, 702 F.2d 454, 458-9 (4th Cir., 1983); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 640-641 (4th Cir., 1983); *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719, 724-725 (4th Cir., 1961).

The bankruptcy court did not consider the debtors' proposed findings of fact and conclusions of law or the evidence introduced at the adversarial hearing on remand. [Bkrtcy., Transcript, January 18, 1986]

The district court and the Eleventh Circuit have misinterpreted "broad dictum" of *Anderson v. City of Bessemer City*, stating that the "clearly erroneous" standard may apply to adopted findings of fact in the absence of credibility determinations based upon the testimony of *live* witnesses. *Anderson, supra* at 511 states that the "clearly erroneous standard may apply to adopted findings on the express basis that ". . . in fact, the findings are those of the court," noting the Fourth Circuit's consistent condemnation of the practice of adopting verbatim findings proposed by the prevailing party:

> "We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken

> the form of conclusory statements unsupported by citation to the record [citing *U.S. v. El Paso Natural Gas and U.S. Marine Bancorp, supra*]. We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor."

The rule of law is clearly stated in *Anderson* that when a trial court has engaged in the condemned practice of adopting verbatim findings of the fact proposed by the prevailing party, the appellate court must consider the circumstances and decide if the adopted findings are nevertheless the judge's *own* impartial findings of fact "specially" stated:

> "In any event, the District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party, . . . Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued . . . vary considerably from those submitted by petitioner's counsel. *Under these circumstances*, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. [105 S.Ct. at 1511]

The district court and the Eleventh Circuit, in misapplying *Anderson*, have engaged in the improper application of the "clearly erroneous" standard about which Mr. Justice Powell expressed concern in his concurring opinion:

> "I write separately, however, because I am concerned that one may read the Court's opinion as implying a criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeals simply to

> apply Rule 52(a) in a conclusory fashion rather than to undertake the type of burdensome review that may be appropriate in some cases [105 S.Ct. at 515]

Indeed, Justice Brennan, in his concurring opinion, clarified the Court's statements concerning the applicability of the clearly erroneous standard to findings not based on credibility determinations as "broad dictim," noting the cases in which the opposite result was reached and that since *Anderson* involved live testimony, the appropriate case for deciding the applicability of the clearly erroneous standard without the testimony of live witnesses had not come before the Court.

It is unlikely that there is a case where the "circumstances" more clearly indicate that the adopted findings were *not* the "judge's own considered" opinions—the findings did not *vary* in either organization or content from those proposed by the Bank of New York. The findings were not even retyped. They were made by a bankruptcy judge whose personal bias against the debtors and cynical views of the appellate process led to his recusal. [Bkrtcy., Transcript, May 15, 1987]

18. *Error*, App. 50a-51a: The bankrupcy court's findings and conclusions included:

> "1. Holdings rejected the debtors' reorganization plans, because, among other reasons, the debtors had no buyer and they were in litigation on nearly every front.[5]"
>
> "[5] Including the City of Miami, IRS, the general contractor, their former lawyers, the former operator and the leasing agent for the hotel, and prospective tenants for the office building."

Fact: The Bank of New York's proposed findings of facts, adopted *in toto* by the bankruptcy court, state as follows:

> "The debtors' plans were predicated upon . . . the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for $260 million." [Bktcy., Order On Remand, paragraph 8(a), p.5]

The "Hadid" Contract of Sale was subject to the bankruptcy court's approval. The Hadid Investment Group was a bonda fide purchaser of the property of Chopin Associates and the Miami Center Limited Partners, having completed the purchase in association with LaSalle Partners and Pocantico Development, Inc., of the assets of Twin Development Corporation, 130 North Seventeenth Street Associates, 1616 Reminc, Eleven DuPont Circle Associates, and DuPont Land Associates, the Sellers of the assets referred to as the "Washington Properties" in an amount of $112,000,000.

Footnote 5 refers to the bankruptcy court's Order On Remand, paragraph 28, App. 110a, which states:

> "The debtors' numerous disputes and litigation on nearly every front—with the IRS, the City of Miami, the ad valorem tax authorities, the general contractor, the debtors' former lawyers, the former hotel operator (TrustHouse Forte), O&Y, the leasing agent (Julien J. Studley, Inc.), prospective tenants, and the Bank—would have, continued or even increased under the debtors' plans, such that the funds of the estates available for the payment of claims of creditors would have been substantially eroded by legal fees and other cases of litigation. All such litigation is detailed in the debtors' amended schedules [C.P. No. 275-278] and disclosure statements [C.P. No. 377-381]."

The pending litigation against the debtors was specified in Exhibit C of the Bank of New York's reorganization plan. Disputed claims were specified in each of the debtors' amended schedules. None of the debtors were involved in litigation against the City of Miami; Morse/

Diesel, Inc., the Miami Center Limited Partnership's general contractor; Cadwallader, Wickersham & Taft, the debtors' former lawyer; Studley-Holywell, Inc., the office building's leasing agent; prospective tenants; or Trust-House Forte, the hotel's former operator. Cadwallader, Wickersham & Taft's claim against Theodore B. Gould was disputed only for pre-petition interest claimed on legal fees under New York law; the bankruptcy court denied the law firm's claim for interest on legal fees and the district court reversed. Trusthouse Forte's claim in excess of $6.4 million was disputed and settled for $988,000. The claim of Chase Bank International, a tenant of the office building, in the amount of $950,000 was disputed and involuntarily dismissed in the Circuit Court of the 11th Judicial Circuit for Dade County, Florida. The claim of Costa Lines, a subtenant of Chase Bank International, in the amount of $250,000 was disputed and involuntarily dismissed by the Circuit Court for Dade County. The lien claim of James P. Driscoll, Inc., the electrical subcontractor, in the amount of $1,183,721 was disputed; the lien was dismissed and a judgment entered *on behalf* of the Miami Center Limited Partnership in the amount of $1,586,000 in the Circuit Court of Dade County, affirmed on appeal. The claim of Richard A. Plehn, Inc., a mortgage broker, in the amount og $250,000, was disputed and denied. [E.D. Va., CA-84-00819-A, 1986; affirmed by 4th Cir., 86-3574, 1987]. The lien claim of Henry Keel, a construction consultant, in the amount of $750,000, was dismissed with prejudice by the Circuit Court of Dade County. The lien claim of Interstate Window Cleaning, Inc., in the amount of $135,804.96, was dismissed with prejudice by the Circuit Court of Dade County. The lien claim of H.C. Yu & Associates, a consulting engineer, in the amount of $107,446.22 and $51,860.65, were disputed and settled for *$91,000*. Olympia & York Florida Equity Corp.'s claims in the amount of $46,010,000 against Theodore B. Gould, $15,300,000 against the Miami Center Limited Partner-

ship, $1,700,000 against Holywell Corporation, were disputed and released with prejudice. Dade County did not file a proof of claim for disputed ad valorem taxes assessed for the years 1982, 1983, and 1984, or an application for administrative expense for 1985; the disputed assessed value was *$20,062,550* for *1982*, *$89,875,877* for 1983, *$183,734,292* for 1984, *$183,734,292* for 1985; post-petition interest has been claimed for non-consenual statutory liens; Chopin Associates and the Miami Center Limited Partnership have filed an adversary proceeding against Dade County in the United States Bankruptcy Court for the Southern District of Florida, alleging that Dade County's Property Appraiser and Tax Collector are barred from collection of ad valorem real property taxes pursuant to 11 U.S.C. Section 1141 [See, e.g., *In re American Properties, Inc.*, 30 Bankr. 239 (Bankr. D. Kan. 1983)] for failure to file a Proof of Claim before the bar date of January 15, 1985, or an Application For Administrative Expense before the Effective Date of the Plan's confirmation October 10, 1985, and are not entitled as non-consensual lien claimants to collect any interest accruing subsequent to the date of the filing of the Plaintiff's petition on August 22, 1984 [See, e.c., 11 U.S.C. Section 506(b); *In re Boston & Maine Corp.*, 719 F.2d 493 (1st Cir., 1983), cert denied, 466 U.S. 938, 104 S.Ct. 1913, 80 L.Ed. 2d 461 (1984); *In re Kerber Packing Co.*, 276 F.2d 245 (7th Cir. 1960); *United States v. Mighell*, 273 F.2d 682-684 (10th Cir. 1959); *United States v. Bass*, 271 F.2d 129 (9th Cir. 1959); *United States v. Harrington*, 269 F.2d 719 (4th Cir. 1959)].

19. *Error*, App. 51a: "Elaborate findings on relations between the debtors that supported the requirement for consolidation."

Error, App. 52a: ". . . hundreds of creditors (many not represented by counsel) should not be required 'to engage in a shell game' in attempting

to determine which of the inter-related debtors involved in the Miami Center project would be able to pay them."

Error, App. 52a: "The difficulty in tracing the obligation of claims against the *affiliated creditors* was, the court held, 'completely attributable to the labyrinth that Gould has created'." [Emphasis supplied]

Fact: "The Findings on Substantive Consolidation As Proposed by the Bank's Plan," paragraphs 29-41, App. 110a-116a, were not introduced as evidence by the testimony of live witnesses, subject to examination or cross-examination, and are either false statements, or taken out of context, knowingly by the Bank of New York's attorneys, represent a misstatement of the record, or in the absence of evidence of a sham, alter- ego, or fraudulent transfer of assets do not support substantive consolidation of the debtors' estates for the purpose of using Holywell's assets to pay claims against the Miami Center Limited Partnership, illustrated as follows:

Paragraph 29 states that all of the creditors' committees supported substantive consolidation and no creditor objected to consolidation. In fact, the Unsecured Creditors' Committee for Holywell Corporation objected to substantive consolidation [C.P. 444, 536] as proposed in the Bank of New York's plan, and was induced to withdraw its objection based upon the Stipulation amending the application of consolidation of the debtors' estates to provide for prior payment of claims against Holywell Corporation before its assets could be used to pay claims against other debtors.

No third-party creditor objected to substantive consolidation, because the Bank of New York's amended consolidated plan did not establish a reserve for the unliquidated claims of the United States of America and the Commonwealth of Virginia based upon Holywell Corporation's federal and state income tax liability for the fiscal

years ending July 31, 1985 and July 31, 1986 as a consequence of the plan's implementation, no confirmation hearing was held, the bankruptcy court's Confirmation Order was issued without notice, and by operation of law, 11 U.S.C. Section 506 (b) precluded the payment of post-petition interest on the Bank of New York's "undersecured" claim, the findings of fact on remand stated that the subordinated creditors would be paid in full or in part, and the Bank of New York did not disclose the damaging consequences of substantive consolidation upon the United States of America and the Commonwealth of Virginia.

Paragraph 30 represents statements from Theodore B. Goulds 2004 deposition, taken out of context from pages 31, 202, and 55 and knowingly misstated to provide false evidence that (a) Holywell Corporation did not observe corporate formalities and (b) misconstrued the dividend process allowable under state corporation law of a corporate subsidiary to Holywell Corporation as its parent for the purpose of using the subsidiary's assets without satisfying its liabilities in the absence of consolidation [See, e.g., S.D. Fla., *Theodore B. Gould and Holywell Corporation v. Fred Stanton Smith, et al.*, Case No. 86-0858-CIV-RYSKAMP, February 20, 1987, App. 190a; affirmed Case No. 87-5195 (11 Cir. March 18, 1988), App. 201a]. In fact, the record's uncontroverted evidence was that Holywell Corporation's financial affairs were audited in accordance with generally accepted accounting standards for the years 1980, 1981, 1982, 1983 and 1984; notes were issued for loans, each corporate subsidiary had a separate payroll, balance sheet, and income statement, paid its own expenses, and corporate formalities were observed with respect to the legal requirements of independent corporation. Moreover, the bankruptcy court's approval of the Miami Center Limited Partnership's liability to Holywell's non-filed corporate subsidiaries, allowing payment to terminated employees, was based upon agency agreements for the operating subsidiaries' per-

formance of services, reviewed and approved by the Bank of New York.

Paragraph 31(b), "Gould is jointly and severally liable for all of the debts of debtor MCLP and of debtor Chopin because he is a general partner of each (Sections 620.62, and 620.625, Florida Statutes)" is a false statement, consistently denied, and a misconstruction of Florida partnership law. In fact, $89,500,000 in the fact amount of the Miami Center Limited Partnership's notes issued to the Bank of New York were non-recourse and the contractual terms of the loan documents had a specific provision, stating as follows:

> "The holder hereof agrees not to seek any deficiency judgment against the Borrower, or any member thereof, in any action to foreclose the Mortgage, for an amount in excess of funds held by the holder hereof pursuant to this note or the Morgage or the Ground Lease between Chopin Associates, a Florida general partnership and Borrower ("Ground Lease"), and agrees that in the event that any suit is brought against the Borrower (other than for fraud or breach of trust) for damages or a money judgment, any judgment obtained in such a suite will be enforced only against (i) the Property, the accounts receivable, the contract rights and the rents, issues, profits, proceeds and income therefrom, (ii) any funds held by the holder hereof pursuant to this note, the Mortgage or the Ground Lease, (iii) insurance and condemnation awards and proceeds and (iv) security deposits."

Paragraph 32 misconstrued the testimony of Mr. Craig Toll, Touche Ross & Co., the certified public accountant responsible for auditing the financial affairs of the Miami Center Limited Partnership, Chopin Associates, Holywell Corporation, and Miami Center Corporation in accordance with generally accepted accounting standards. Mr.

Toll testified that (a) the assets and liabilities of each debtor were segregated, (b) corporate formalities were observed; (c) the Miami Center Corporation's financial records were separately audited and its assets, liabilities and income stated separately in the consolidated audit of Holywell Corporation and its wholly-owned corporate subsidiaries. In fact, Holywell Corporation did not (1) provide the Miami Center Corporation's capital in the amount of *$2,750,000*, (2) the parent company did not convey any assets to the Miami Center Corporation, and (3) the Miami Center Corporation did not engage in any business providing services to Holywell Corporation. Furthermore, Touche Ross was not the accountant for Theodore B. Gould and Mr. Toll testified that Touche Ross did not prepare Holywell's tax returns. In reviewing paragraph 32, as applied to the presence of consolidated financial statements, the district court, having erroneously stated that "a review of those [the Bank of New York's proposed] findings . . . reveals that there exists in this record strong and convincing evidence of at least five of the seven factors enumerated in [*Donut Queen*]," including "The presence of consolidated financial statements (*inapplicable* to debtors Holywell and Miami Center Corp.) . . . ."

Paragraph 33 falsely states that "the debtors cross-guaranteed each other's liabilities to the Bank and to various other creditors." In fact, (a) the Bank of New York's *Complaint To Determine Amount, Validity, and Extent Of Lien*, filed in February 1985, (Adv. Proc. No. 85-0160-BKC-TCB-A) stated that Holywell Corporation's ". . . guarantee of loan indebtedness [was] in the outstanding principal sum of $105,586,027.03 plus interest accrued . . ." and Theodore B. Gould's ". . . guarantee of loan indebtedness [was] in the outstanding principal sum of $107,336,027.03," and (b) the Bank of New York's loan of $1,750,000 plus accrued interest to Holywell Corporation was guaranteed only by Theodore B. Gould. The

Miami Center Limited Partnership did not guarantee the indebtedness of the Miami Center Corporation, Chopin Associates, Holywell Corporation or Theodore B. Gould.

Paragraph 34 is a false statement, misconstruing the record with respect to the segregation of claims filed against the various debtors. In fact, the bankruptcy court entered an order on April 26, 1985, to which schedules were attached segregating the claims against each debtor and on July 11, 1985, the court entered an *Order On Debtors' Objection To Claims*, segregating and allowing or rejecting each disputed claim not subject to litigation. (C.P. 803)

Paragraph 35(a)-(k), (n), and (o) falsely misrepresent undisputed and valid claims of Holywell Corporation and its non-filed wholly-owned corporate subsidiaries against the Miami Center Limited Partnership, for prepetition loans and services, reviewed and approved by the Bank of New York, as ". . . *inter-company* indebtedness . . . ." Paragraph 35(1) falsely states that "Pietro Belluschi, Inc." is a wholly-owned subsidiary of Holywell Corporation.

Paragraph 36 is a misstatement of Theodore B. Gould's 2004 deposition and is based upon a material act of omission concerning the Bank of New York's conduct. The Bank of New York reviewed, approved, and controlled the disbursements of the Miami Center Limited Partnership, Theodore B. Gould, Holywell Corporation, and its wholly-owned subsidiaries through segregated accounts and various assignment and security agreements. [App. 300a]

Paragraph 39 falsely states Miami Center Corporation's equity ownership in Miami Center Limited Partnership as its *residual* interest upon repayment of the capital contribution and dividends in arrears of the limited partners.

Paragraph 40 is based upon the material omissions that the Miami Center Limited Partnership was liable for payment of the subject employment payroll taxes, penalty and interest to the Internal Revenue Service and the Bank of New York as the "employer-in-fact" was liable for payment of the employment payroll taxes, penalty and interest pursuant to I.R.C. Section 3505(b), having engaged in "net" payroll financing and refusing to allow payment of the employment payroll taxes based upon asserting that the priority of the Internal Revenue Service was subordinate to the lender's lien.

Paragraph 41's statements concerning the ownership interests and control of the Miami Center Limited Partnership are false, the evidence is uncontroverted, and the Bank of New York's attorneys had knowledge that Theodore B. Gould did not exercise control over the Miami Center Limited Partnership.

20. *Error*, App. 51a: "Detailed findings of improprieties involving the Gould interests that justified subordination of various of the Gould-related claims."

Fact: The "Findings On Equitable Subordination" [pp. 27-29] are false statements and represent misconstruction of the law. Paragraph 46 ". . . the Court approved the junior classification accorded such claims [Classes 7, 8 and 9] by the Bank's plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. Section 1122) that had no such affiliation with the debtors" is misconstruction of applicable statutory requirements and case law for subordination. 11 U.S.C. Section 510; App. 144a, reversing the Confirmation Order's approval of the subordination of insiders' claims based upon classification.

Paragraph 47(a) omits the material fact that the Bank of New York reviewed, approved, and controlled the disbursements of the Miami Center Limited Partnership, rejecting payment to creditors with priorities subordinate to the lender's lien and using funds derived from the sale of assets for which the Bank had been granted additional collateral assignment specifically to "complete the project," to pay interest expense and lender's fees. [App. 300a]

Paragraph 47(b) "conflicts of interest resulting from his [Theodore B. Gould] control of both lessor and lessee under the MCJV-MCLP FF&E agreements, the HTC-MCLP FF&E agreement, the HLC-MCLP FF&E agreement, and the Chopin-MCLP ground lease" is a false statement based upon the material acts of omission that the Bank of New York reviewed and approved each lease, each lease was specifically required by the structure of the permanent financing commitments of the Metropolitan Life Insurance Company and Bankers' Life Company, and the references to the FF&E leases are directly contrary to the bankruptcy court's *own* prior findings of fact, stated in the "true lease" decisions. [*Miami Center Joint Venture*, App. 137a; *Holywell Telecommunications Company and Holywell Leasing Company*, App. 167a]

Paragraph 47(c) ". . . failure to pay withholding taxes . . ." is based upon the material act of omission that the Bank of New York controlled the disbursements of the Miami Center Limited Partnership's funds and funds derived from the sale of assets in which Holywell Corporation and Theodore B. Gould had invested, engaged in "net" payroll financing, and refused to allow payment of the employment payroll taxes based upon the subordinate priority of the liability to the Internal Revenue Service, rejecting a Settlement Agreement with the Internal Revenue Service, November , 1983.

Paragraph 48 represents misconstruction of the law concerning subordination, is directly contrary to the finding of fact that ". . . there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants," and material acts of omission concerning the Bank of New York's misconduct related to (a) lack of disclosure of sufficient detail with respect to liability for federal and state income taxes, (b) not specifying the treatment of impaired classes, and (c) not providing adequate means for the plan's implementation.

21. *Error*, App. 51a: ". . . The Court further finds that the Bank was a good faith purchaser . . . applying the rule of law to the Bank of New York that the 'good faith purchaser' is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim." [p. 1847]

    Error, App. 56a: "On remand the bankruptcy court held the bank was a good faith purchaser, and the district court affirmed the bankruptcy court's findings and affirmed the confirmation order, as amended by the bankruptcy court's findings and conclusions. . . No factual argument is advanced why the bank is not entitled to good faith purchaser status . . . ."

Fact: The district court in denying the Bank of New York's motion to dismiss the grounds of mootness and remanding the case to the bankruptcy court for findings of fact on substantive consolidation and subordination, stated in relevant part as follows concerning the express finding that the Miami Center property was *not* sold to a good faith purchaser:

> "The property was sold not to a disinterested, third party purchaser, but to the appellee itself, through its designee . . . ." [App. 81a]

The district court's remand did not include the "mootness" issue, and the finding of fact that ". . . the Bank was a good faith purchaser" is a specific illustration of the abuse resulting from adoption *in toto* of the findings of fact of a prevailing party, since a specific determination is required pursuant to a hearing designated for that purpose. *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 147 (3rd Cir. 1986).

Notwithstanding the Eleventh Circuit's adoption of the definition of a "good faith purchaser" as a purchaser ". . . free of any fraud or misconduct . . ." and 11 U.S.C. Section 1129(a)(2) and (3) stating in relevant part, that "the court shall confirm a plan only if . . . the proponent of the plan complies with the applicable provisions of this title [and] the plan has been proposed in good faith and not by any means forbidden by law," it is absurd to grant deference to the Bank of New York's own proposed findings of fact that (a) "the Bank was a good faith purchaser," (b) "the plan was fair, feasible, and proper," (c) the plan ". . . has been substantially consummated" without having satisfied the constitutional requirements of due process of law, applicable statutory procedural requirements for confirmation of a plan, and based upon a plan improperly subordinating claims of "insiders" and lacking adequate means for its implementation [i.e., no funds for the repayment of court-authorized super-priority loans, federal and state income taxes, and inadequate funds for the payment of administrative expenses.]

22. *Error*, App. 51a: "With respect to the separate suit, the court found it had no significant value because debtors had executed releases as to transactions between them and the bank; rather the suit was a detriment to the estate because of the attorney fees it was generating."

    App. 62a: "The district court held that the bankruptcy court had the power to order the trustee to

dismiss the separate fraud/RICO case because: (1) it was a chose in action which was part of the debtors' estates; (2) on remand the bankruptcy court had conducted a cost/benefit analysis of the value of the suit and concluded that its value was nil; (3) evidence adduced at a post-remand hearing showed that the releases previously signed by debtors barred their pursuing the civil action on principles of collateral estoppel.[9]"

> "[9] The bankruptcy court held that it was within the scope of its authority in making this determination because the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against parties filing claims against the estate, and/or confirmation of plans, and/or other proceedings, affecting the liquidation of the assets of the estate, and therefore constituted a 'core' proceeding."

App. 62a: "Had the appeal to the district court on the consolidation and confirmation orders been dismissed as moot, as it should have been, the judgment of the bankruptcy court in that appeal would have become final. The issues adjudicated by that judgment would then have been precluded from re-examination by Judge Hoeveler in his consideration of whether to dismiss the fraud/RICO case."

App. 63a: "Debtors' suggestion that the bankruptcy court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense."

Fact: The district court's denial of the Bank of New York's motion to dismiss on the grounds of mootness stated in relevant part concerning "the separate fraud/RICO case":

> "Denial of the liquidating trustee's authority to dismiss the appellants' district court suit would simply allow the action to remain viable, and . . . at most necessitate further hearings . . . Thus, the posture of this appeal . . . is by no means such that events have rendered meaningful review impossible." *Miami Center Limited Partnership, et al., v. The Bank of New York*, December 30, 1985, App. 80a]

Since the Bank of New York drafted the subject releases and did not disclose that the computation of the face amount and accrued interest specified was based on its "published prime rate," not the "contract rate" of the $23,000,000, $47,500,000, and $42,000,000 notes, and has subsequently refused to provide any data from which corrected computations could be made, the fraudulent nature of the releases and the Bank's conduct is clearly established.

When one party conceals material information from the other party to a contract, pretending to be supplying the data which the contract requires, and obtains a blanket release from the other party before the other party has had an opportunity to discover the deliberate misstatement, the breach of good faith and fraudulent nature of the conduct is self-evident. Construing fraudulent documents as barring the petitioners from seeking legal redress of wrongful injuries based upon collateral estoppel is a substantial injustice.

The Chapter 11 estate and its administration ceased to exist as an effect of confirmation. It has been consistently held pursuant to 11 U.S.C. Section 1141:

> "After confirmation of a plan under Chapter 11, administration of the estate ends and the estate ceases to exist . . . Thus, it is impossible to classify [attorney's fees] that accrue post-confirmation as administrative expenses for the simple reason that after confirmation there is no longer an estate to administer." *In re Frank Meador Buick, Inc.*, 65 B.R. 20 at 203 (W.D. Va. 1986), citing *In re Barker Medical Company, Inc., supra, United States v. Redmond*, 36 B.R. 932, 934 (D. Kan. 1984) aff'g *In re Westholt Mfg., Inc.*, 20 B.R. 368 (Bkrtcy. D. Kan. 1982)

Therefore, if the trustee's authority to dismiss the separate fraud/RICO case had been denied, the attorney's fees would not have been a detrimental expense of the estate. The attorney's fees would have been payable by the petitioners as discharged debtors.

The Bank of New York's offer to purchase the subject land, leasehold improvements and chattels for $255.6 million was based upon an MAI-appraisal of the Miami Center's fair market value and upon review of the testimony on remand accepted by the district court as not clearly erroneous. Thus, dismissal of the fraud/RICO case as a chose-in-action and the prerequisite condition of the Bank of New York's offer to purchase was granted gratuitously without consideration. Alternatively, if the Bank of New York foregave default interest of *$2,533,812* for the period from February 1, 1984 to the date of filing as consideration for dismissal of the fraud/RICO case, the amount of the default interest must be compared with the evidence presented at the remand hearing concerning the estimated amount of interest expense in the amount of $13.1 million charged in excess of the contract rate and the damage caused by the Bank of New York's fraud and breach of good faith.

In establishing the value of the fraud/RICO case, Mr. Craig Toll, Touche Ross & Co., testified that his firm had

performed studies as a comparative analysis of the Bank of New York's "published prime rate" and the GMAC 90-day commercial paper rate as an index for the "contract rate" of the $23,000,000, $47,500,000, and $42,000,000 notes concluding that "the total [difference] is . . . between $12 million and $13 million." [Bktcy., Transcript, January 18, 1986, pp. 57-58] In cross-examination, the Bank of New York did not dispute Mr. Toll's testimony and offered no evidence that the difference in the interest expense improperly charged was less.

The Bankruptcy Court's decision to approve a plan providing for dismissal of a separate United States District Court case is violative of the constitutional doctrine of separation of powers. The judicial power of the United States must be exercised by Article III judges. Although non-Article III courts may act as adjuncts to the district courts, their jurisdiction is limited and they are subject to the close supervision of the district courts. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982); *United States v. Raddatz*, 447 U.S. 667 (1980). A bankruptcy court may not dismiss a civil action filed in district court. A bankruptcy court does not have the power and authority to deprive a district court of a case within its jurisdiction. Furthermore, if a bankruptcy court does not have the authority to direct a district court to dismiss a case, certainly it may not dismiss a district court case indirectly, by approving a plan of reorganization under which a trustee will dismiss the case as a chose-in-action, particularly a trustee appointed without satisfying the requirements of 11 U.S.C. Section 1104(a).

The District Court's "chose-in-action" resolution of this argument as an asset of a debtor's estate, and thus, subject to the bankruptcy court's jurisdiction, avoids the critical issue: A bankruptcy court's power and authority is specifically defined by the Bankruptcy Reform Act of 1978, as amended, and is subject to the Constitution. The

Bankruptcy Code cannot be construed to make it *possible* for a bankruptcy court to interfere with the jurisdiction of a district court, since the bankruptcy court's interference would be unconstitutional.

The district court was wrong in ruling that the bankruptcy court was within its jurisdiction in determining in an adversary proceeding that the releases barred Debtors from pursuing the claims made in the Hoeveler lawsuit,* and from determining that the Hoeveler lawsuit should be dismissed on collateral estoppel grounds, because this determination involved either (1) a matter concerning the administration of the estates, (2) a counterclaim by the estate against persons filing claims against the estate, (3) a matter concerning confirmation of plans, or (4) a matter concerning other proceedings affecting the liquidation of the assets of the estate, as a "core" proceeding. 28 U.S.C. Section 157(b)(2).

The district court erred in holding that the resolution of a controversy concerning fraud, breach of good faith, usury, and breach of contract were "core" proceedings. The statutory distinction between "core" and "non-core" proceedings made in the aftermath of *Northern Pipeline* to clarify a bankruptcy court's jurisdiction include 28 U.S.C. Section 157(c), adopted pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, pursuant to which in a "non-core" proceeding, unless all parties consent, a bankruptcy court may

---

* Indeed, the *only* testimony offered by the Bank of New York as to the effect of the alleged releases was the "expert" testimony on remand of an attorney, Herbert Stettin, who had no involvement whatsoever in the procurement of the documents. Subsequent to his employment as an "expert" by the Bank, Mr. Stettin was installed by Bankruptcy Judge Britton as counsel for the Trustee of the Miami Center Liquidating Trust. The May 15, 1987 *ex parte* conference at which the Trustee was told to fire his original counsel and to contact Mr. Stettin as his replacement led to the issuance of a writ of mandamus directing Bankruptcy Judge Britton's recusal. [App. 336a]

conduct a hearing, but both his findings of fact and conclusions of law are subject to *de novo* review on appeal, much like those of a magistrate. Only a district court may enter a final order or judgment on a "non-core" matter. Furthermore, if the proceedings require consideration of other laws of the United States regulating organizations or activities affecting interstate commerce—such as RICO—in addition to the bankruptcy laws, the reference to the bankruptcy court must be withdrawn, no hearing at all is permitted in the bankruptcy court, and only a district court may conduct the proceeding. 28 U.S.C. Section 157(b).

The issues related to the releases rendered the adversary proceeding—at least in part—a "non-core" proceeding. The Debtors' affirmative defenses to the releases raise state court fraud issues and claims of RICO violations, and thus, clearly involve either state law or statutes of the United States other than the Bankruptcy Code. As such, withdrawal of the reference to the bankruptcy court was mandatory. *See Dairyberry v. Toledo Trust Co. (In re Hartley)*, 55 Bankr. 781 (Bankr. N.D. Ohio 1985). Indeed, Judge Hoeveler's failure to grant the Debtors' emergency motion to withdraw the reference prior to the bankruptcy court's hearing was error. The parties cannot even waive the provisions of Section 157(d) and allow a bankruptcy court to hear such a "non-core" matter. *Id.* Similarly, the Bank's reliance upon the releases under state contract law as a response to the Debtors' affirmative defenses is a "non-core" proceeding even if raised as counterclaims in a "core" proceeding. *See Piombo Corp. v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986):

> The district court and Eleventh Circuit are incorrect in ruling that the bankruptcy court had authority to enter the order regarding the releases on the grounds that the matter involved a counterclaim by the estate against persons filing claims against the estate. It

> may be that, if the estate chose to raise an otherwise non-core matter in a counterclaim to a claim filed against it, then the estate has voluntarily submitted that matter to the bankruptcy court's review. However, the debtors did not raise their RICO claims as counterclaims against the Bank but rather as affirmative defenses. The debtors also did not seek to have these matters adjudicated in the bankruptcy court but rather sought to have the issue of the affirmative defenses to the amount, extent, and validity of the Bank of New York's lien deferred until decision by the district court.

The district court's reference to the "catch-all" provisions regarding matters concerning the estate's administration and matters otherwise affecting assets of the estate, 28 U.S.C. Section 157(b)(2)(A) and (O), simply read those "catch-alls" too broadly. Administration of the estate involves such matters as approval of administrative expenses, attorney's fees, appointment of professionals and other such matters, not affirmative defenses touching on substantive federal statutes other than the Bankruptcy Code. The debtors' claims against the Bank for fraud and RICO violations do not affect the estate's assets or affect the adjustment of the debtor-creditor relationship between the debtors and the Bank except to the extent that any cause of action held by a debtor is a chose-in-action which is an asset of the estate. The district court's theory simply proves too much. It would give a bankruptcy court *de facto* jurisdiction over any claim by a debtor even if adjudication of the claims requires consideration of state law matters or laws of the United States regulating organizations or activities affecting interstate commerce other than the Bankruptcy Code.

The Bank of New York did not include dismissal of the separate fraud/RICO case as a prerequisite of its Plan to benefit the Debtors' estates. Its purpose was

solely to benefit the Bank of New York, fearing liability for treble damages because of the excessive interest it had charged the Debtors.

23. *Error*, App. 51a: "The court . . . had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its fairness, feasibly and propriety had been verified by these occurrences: administrative claims had been paid or reserved; secured claims had been paid in full; class 3 claims had been paid in full; undisputed claims in classes 4 through 6 had been paid in full and funds reserved for disputed claims; several disputed claims had been compromised, saving the estate millions of dollars; there remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (many of which were unliquidated)."

"No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141."

"It is not legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the staus quo before confirmation."

Error, App. 58a: "The debtors acknowledge that the plan of reorganization has been substantially consummated, but . . . say, it remains not completed . . . ."

Error, App. 61a: "The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had be-

come legally and practically impossible to unwind the consummation of the plan . . . ."

Fact: There is no clearer illustration of the bankruptcy court's conduct violative of due process of law and the consequences of nullifying the rules of procedure formulated for trial without a jury than the adoption verbatim of the Bank of New York's proposed findings of fact and conclusions of law concerning substantial consummation of the plan and the granting of deference based upon application of the "clearly erroneous" standard of review. The facts are as follows:

(a) On *March 20, 1987*, the bankruptcy court found that the plan had *not* been substantially consummated in entering an *Order Directing Status Conference And Setting Hearings* [App. 94a]

(b) On *March 20, 1987*, the district court ruled "I find that the court erred in confirming the plan which placed the O&Y/MCJV lease claim in Class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the Class 7 creditor [MCJV]" [App. 144a]

(c) On *August 17, 1987*, the bankruptcy court stated in a discussion concerning the court's post-confirmation jurisdiction that ". . . the debtors including yourself [Theodore B. Gould] as an individual debtor, have *not* been discharged." [Bkrtcy., Transcript, August 17, 1987, p. 33]

(d) The Bank of New York's plan did not establish a reserve or provide for the repayment of court-authorized "super-priority" loans in the amount of $4,717,404 plus accrued interest [Bkrtcy., *Motion Denying Reconsideration*, April 1, 1987], the bankruptcy court, having affirmed immediate repayment of the loans, stated ". . . I would not have confirmed a plan nullifying the 1985 orders that are at issue here."

(e) The Bank of New York's plan did not establish a reserve for undisputed administrative claims of affiliated creditors in an amount of $3,465,093 and the post-confirmation priority claims for legal, accounting and management fees against the Miami Center Liquidating Trust in excess of $2,000,000 granted priority as "administrative expenses"

(f) The Bank of New York's plan did not establish a reserve for unliquidated federal and state income tax liabilities arising as a consequence of the plan's provisions in an estimated amount of $20.8 million. [App. 204a]

24. *Error*, App. 59a: "We turn . . . to the relief that the debtors seek and the relationship between it and the reorganization plan . . . . They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF&E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some 'super-priority' ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank."

"The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee."

Fact: A comparative analysis of the above statement with the Eleventh Circuit's June 29, 1987 opinion and the relief requested is illuminating:

"Debtors request the following specific relief:

(1) reverse in part the substantive consolidation order and unconsolidate the estates that are solvent

(Holywell and Gould), close their cases, and let them emerge from bankruptcy with their remaining assets;

(2) reverse in part the confirmation order and restore to their proper status 'super-priority' loans made by Gould and Holywell to the Miami Center Project so that they have priority over all other creditor claims;

(3) reverse in part the confirmation order and modify the reorganization plan so that leasing claims by debtor-affiliated creditors are restored to the priorities to which they are entitled under the Bankruptcy Code;

(4) reverse in part the confirmation order and vacate the trustee's certificate that entitles the Bank to recover any funds it advances to the joint venture for furniture, fixtures and equipment or modify the reorganization plan so that the Bank's claim for reimbursement is junior to debtor-affiliated claims;

(5) distribute the remaining funds in accordance with the revised classification of the remaining creditor claims; and

(6) reverse Judge Hoeveler's dismissal of debtors' related action against the Bank and reverse in part the confirmation order, thus requiring the trustee to pursue debtors' related action or permitting debtors to pursue the action on their own." *Miami Center Limited Partnership v. Bank of New York, supra* at 3406, Exhibit . –

The remedy sought in the appellants' brief of August 27, 1986, denied in the Eleventh Circuit's above cited opinion, was as follows:

"Even though the Bank's Plan has been substantially implemented, the Plan is *not* yet consummated. Effective relief—though perhaps not complete re-

lief—can be fashioned . . . Debtors request that this Court reverse and remand for the following relief:

1. Reverse in part the District Court's Final Order in Case No. 86-5286 affirming the Bankruptcy Court's substantive consolidation order and remand with instructions to the Bankruptcy Court that the Bank's Plan be modified to the extent that the Debtors' estates be unconsolidated, and that those estates that are solvent be allowed to close their bankruptcy cases and emerge from bankruptcy.

2. Reverse in part the District Court's Final Order in Case no. 86-5286 affirming the Bankruptcy Court's substantive consolidation order and remand with instructions to the Bankruptcy Court that the Bank's Plan be modified to the extent that (a) funds of Gould and Holywell heretofore disbursed by the Liquidating Trustee in payment of claims of other Debtors be accorded treatment as 'super-priority' loans secured by liens upon property of the estates of those Debtors superior to any remaining, and as yet unsatisfied, claims of all other parties to such property, and (b) the 'super-priority' loans made by Gould and Holywell to the estate of MCLP prior to confirmation of the Bank's Plan and upon order of the Bankruptcy Court be restored to status as loans—equal in status with the amounts referred to in (a) above—secured by liens on the property of the MCLP estate with a priority superior to any remaining, and as yet unsatisfied, claims or contingent claims against the MCLP estate, including any claims by the Bank.

3. Reverse in part the District Court's Final Order in Case no. 86-5286 affirming the Bankruptcy Court's Confirmation Order and remand with instructions to the Bankruptcy Court that the Bank's

Plan be modified to the extent that the claims for payment of affiliated creditors against MCLP, which were equitably subordinated under the Bank's Plan, be restored to the priorities to which they are entitled under the Bankruptcy Code without subordination and be entitled to share in the distribution of the assets of the MCLP estate in accordance with those priorities.

4. Reverse in part the District Court's Final Order in Case No. 86-5286 affirming the Bankruptcy Court's substantive consolidation order and Confirmation Order and remand with instructions that upon application of the Debtors, the Bankruptcy Court shall distribute the cash proceeds derived from the sale of the Miami Center Project to the Bank to claimants in accordance with the order of priority specified in 11 U.S.C. Sections 364 and 507.

5. Reverse in part the District Court's Final Order in Case No. 86-5286 affirming the Bankruptcy Court's Confirmation Order and remand with instructions that the Bank's Plan be modified to the extent that the portion of the Bank's Plan requiring the Liquidating Trustee to dismiss voluntarily the Hoeveler lawsuit be stricken and that either (a) the Liquidating Trustee be instructed to withdraw his voluntary dismissal stipulation or (b) the Liquidating Trustee be instructed the abandon the Hoeveler lawsuit to the Debtors and the Debtors be permitted to continue the Hoeveler lawsuit at their own expense and not that of the Debtors' estates and with any recovery going to the Debtors and not to the Debtors' estates.

6. The Final Order of Dismissal with Prejudice in Case No. 86-5386 be reversed and the case remanded to the District Court with instructions to reinstate the case in accordance with further events

occurring as a result of the Court's Order under (4) above.

7. Reverse in part the District Court's Final Order in Case No. 86-5286 affirming the Bankruptcy Court's Confirmation Order insofar as it confirmed the Second Amendment to the Bank's Plan and remand with instructions either (a) to vacate that part of the Second Amendment requiring the Liquidating Trustee to issue a trustee's certificate to the Bank, secured by the Debtors' consolidated assets, or (b) to provide that any claim by the Bank is secured only by the remaining assets of the MCLP estate and is junior to the claims of Holywell and Gould accorded 'super-priority' status.

The relief proposed here, although it would not provide a complete remedy for all of the damage suffered by the Debtors as a result of the infirmities in the Bank's Plan and the procedural irregularities of the bankruptcy proceedings, would at least provide a partial cure. Permitting the Debtors to reinstate the Hoeveler lawsuit would remedy the unconstitutional action taken by the Bankruptcy Court in authorizing the dismissal of that action. A ruling that the Bank may not seek repayment and amounts paid to satisfy claims under the "A" and "B" Leases would also help eliminate the harm suffered by the Debtors as a result of the unlawful adoption of the Second Amendment. Such a ruling would also help reduce the harm suffered by the Debtors as a result of substantive consolidation. Without substantive consolidation—which gave the Liquidating Trustee access to the assets of Holywell—there would not have been enough money to pay the creditors of MCLP, let alone pay the claims under the "A" and "B" Leases. In other words, it is in part by virtue of substantive consolidation that there is any money left in the Debtors' estates to repay the Bank for

amounts it advances to satisfy the MCJV claims. Finally, refusing to allow the Bank of seek repayment from the Debtors' estates would partially compensate the Debtors for the injury they suffered as a result of equitable subordination. If the subordinated claims had been properly classified, the debtors, as well as HTC and HLC, would have received some payments on their claim. Prohibiting the Bank from seeking compensation from the Debtors' estate would ensure that their right to payment is not irrevocably lost." [11th Cir., *Miami Center Limited Partnership v. Bank of New York*, Brief, pp. 50-54]

In the Appellants' Petition for Rehearing of the Eleventh Circuit's June 29, 1987 order denying the debtors' appeal on the grounds of mootness, the limited relief requested was further clarified as follows:

"(1) *Debtors do not request any relief that would affect third-party creditors.* The District Court noted below that the Debtors have not sought in the relief they request to recover any amounts paid or set aside to be paid to third-party creditors. App. -4-16 to 17; *see also* Mootness Response, at 20-21. It is essential that the Court realize that the funds to pay the third-party creditors and set up reserves came from the nearly $16.6 million in cash in the estates and $16.7 million in cash belonging to non-filed, affiliated creditors that was realized through the sale of certain unrelated, distinct property in the Washington, D.C. metropolitan area. None of the remedies requested by the Debtors would touch the payments already made or the reserves. The remedies requested by the Debtors affect only the relationship between claims of the Debtors and affiliated creditors on the one hand and claims of the Bank on the other. The limited relief requested by the Debtors is based upon the redistribution of the sales proceeds of $255.6 million in accordance with proper

legal priorities of the creditors of MCLP. If, as in the case of *In re Sewanee Land, Coal & Cattle, Inc.*, *supra*, the automatic stay had been lifted, allowing the Bank to foreclose under Florida law, the sale proceeds would have been distributed based upon the priorities of claims related to the property, as requested now by the Debtors in their relief. If substantive consolidation were reversed, the claims of certain Debtors against MCLP would be reinstated and, if entitled to priority in payment over the claims of the Bank,[11] would be paid from the proceeds of the sale of the Miami Center Project to the Bank.[12] Similarly, if equitable subordination were reversed, some claims of affiliated creditors that have priority over some or all of the Bank's claims would be reinstated and paid from the proceeds of the sale of the Miami Center Project. To be sure, the effect of this remedy will be to increase the portion of the $255.6 million purchase price that the Bank will be required to pay in cash and reduce the credit that it will be able to take. This will require that the Bank pay more in cash than it anticipated when it proposed a plan with substantive consolidation and equitable subordination as its hallmarks. But this remedy would not disturb by one penny the amounts already paid to or set aside in reserves for third-party creditors.

---

[11] For example, Chopin has a $5.3 million claim for ground rent against MCLP that would have priority superior to the Bank's claim, except for the effect of substantive consolidation.

[12] As will be discussed in the next section, the closing on the sale of the Miami Center Project was adjourned 21 months ago and has still not yet been finally completed. The Bank has agreed to pay $255.6 million for the property, but has taken the position it should get a credit of $242.7 million off the top against the purchase price for the value of its lien, including $26.7 million in post-petition interest.

> Similarly, reinstatement of the District Court lawsuit against the Bank will not affect the third-party creditors. It is a suit between the Debtors and the Bank only. It is wholly unrelated to the plan except that the requirement that it be dismissed was tossed in by the Bank as an additional free benefit to it. It affects third-party creditors only if the Court reasons that as a *quid pro quo* for offerings the plan the Bank is entitled to the dismissal, and if the case is not dismissed then the Bank is entitled to be released from its financial promises in the plan. As explained below, *see* pp. 11, 14, *infra*, that reasoning has nothing to do with mootness and is mistaken. [Petition For Rehearing, pp. 4-6]"

In the Appellants' Suggestion of Rehearing In Banc, acknowledging the Eleventh Circuit's jurisdiction, power and authority to reconvey title, stated as follows:

> "The appellant's proposed *specific* relief did not demand reconveyance of the property for two reasons: (1) the actions of the Bank of New York and its management of the property had aversely affected the property's viability and market value, so that reconveyance of title would be inequitable relief to the appellants, and (2) effective relief could be granted to the appellants, without harm to any creditor, with the possible exception of the Bank, which was forced to assume the risk of closing the sale despite pending appeals, as a result of the revision of the Plan's "Effective Date," by redistributing the sale proceeds of $255.6 million in accordance with proper legal priorities, based upon reversing substantive consolidation and equitable subordination." [Suggestion Of Rehearing In Banc, pp. 10-11]

Thus, although the Eeleventh Circuit misstated the Petitioners' request for relief, the remedy sought was specific and clearly stated: (1) A sale price higher than

$255.6 million based upon the property's revaluation was *not* requested; (2) Reversal of substantive consolidation and the subordination of affiliated creditors and the valid, undisputed pre-petition claims of Holywell Corporation and Theodore B. Gould against the Miami Center Limited Partnership was requested; (3) Denial of the trustee's authority to issue a Trustee's Certificate to the Bank of New York for the payment of the Miami Center Joint Venture's claim pursuant to the $15,000,000 supersedeas corporate surety bond was requested upon the basis that the bonding requirement for the Bank of New York to preserve and protect MCJV's rights must be construed as a *penalty* for improperly subordinating the Joint Venture's claim and not providing adequate means for payment of its impaired claim; (4) Redistribution of the sale proceeds derived from the $255.6 million purchase price in accordance with proper legal priorities was requested without affecting third-party creditors; and (5) Reversal of the dismissal of the separate fraud/RICO case was requested.

APPENDIX 33

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment V to the Constitution of the United States provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VII to the Constitution of the United States provides in relevant part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

3. The relevant provisions of the Bankruptcy Reform Act of 1978 (11 U.S.C. Section 101 *et seq.**) are as follows:

> *SECTION 105 (11 U.S.C. § 105)*
>
> § 105. Power of Court:
>
> (a) the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

---

* The Chapter 11 Proceedings below were initiated on August 22, 1984. The 1984 Amendments to the Bankruptcy Code, with certain exceptions including Section 105, were made effective as to cases filed on or after October 10, 1985. Therefore, the Bankruptcy Code Sections set out in this paragraph 3 are in the form applicable to this case.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

* * *

SECTION 502 (11 U.S.C. § 502)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor, and unenforceable against property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

* * *

SECTION 506 (11 U.S.C. § 506)

§ 506. Determination of secured status.

"(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unse-

cured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

* * *

SECTION 1104 (11 U.S.C. § 1104)

§ 1104. Appointment of trustee or examiner.

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause but not including the number of holders of

securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

* * *

SECTION 1123 (11 U.S.C. § 1123)

§ 1123. Contents of plan.

(a) A plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(6) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) shall specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's execution, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

* * *

SECTION 1128 (11 U.S.C. § 2118)

§ 1128. Confirmation hearing.

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) a party in interest may object to confirmation of a plan.

SECTION 1129 (11 U.S.C. § 1129)

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of the chapter.

(2) The proponent of the plan complies with the applicable provisions of this chapter.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(7) With respect to each class—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such creditor's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

* * *

(10) At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

• • •

SECTION 1141 (11 U.S.C. § 1141)

§ 1141. Effect of confirmation.

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmation plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor or equity security holder of, or general partner in, the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) After confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests or creditors, of equity security holders, and of general partners in the debtor, except as other-

wise provided in the plan or in the order confirming the plan.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

* * *

3. The relevant provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) are as follows:

a. 28 U.S.C. § 1334(b) provides:

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

b. 28 U.S.C. § 157 provides as follows:

157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exception from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover conveyances;

(G) motions to terminate, annul or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is other-

wise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceed-

ing if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

5. Rule 52(a) of the Federal Rules of Civil Procedure provides:

> Rule 52. Findings by the Court.
>
> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 59; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 51(b).

6. Rule 8(c) of the Federal Rules of Civil Procedure provides in relevant part:

> (c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense. . . .